

*Mr. G. H. Wheat.*  
*George Deming*

*267*

## TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 444

THE UNITED STATES OF AMERICA, PLAINTIFF IN  
ERROR,

vs.

THE ARCHIBALD McNEIL & SONS CO., INC.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF PENNSYLVANIA

FILED JUNE 12, 1924

(30,400)

*from dict in orig*

Hev. + wife went to the fair out.

Plenty of flowers out.

Went to the fair out.

(30,409)

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[fol. 1] **IN UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA, SEPTEMBER  
TERM, 1922**

No. 9792

THE ARCHIBALD McNEIL & SONS COMPANY, INC.,

vs.

UNITED STATES OF AMERICA

Charles H. Burr.

DOCKET ENTRIES

- Nov. 1, 1922. Præcipe for Summons, filed.  
1, Summons exit—returnable first Monday in December, 1922, filed.  
11, Statement of Claim, filed.  
11, Exhibit A, filed.  
11, Notice to file Affidavit of Defense, filed.  
13, Summons returned on November 11, 1922, served and filed.  
17, Stipulation of counsel extending time in which to file Affidavit of Defense, filed.
- Dec. 16, 1922. Special appearance of George W. Coles, filed.  
16, Motion to dismiss Statement of Claim, filed.  
16, Præcipe to place cost on Argument List, filed.  
27, Affidavit as to service of Summons and Statement of Claim, filed.
- Feby. 15, 1923. Opinion, Dickinson, J., dismissing Motion to dismiss Statement of Claim, filed.  
20, Præcipe to place case on Trial List, filed.  
28, Defendant's exception to Opinion of the Court dismissing Motion to dismiss for want of jurisdiction, filed.  
28, Affidavit of defense raising questions of law, filed.
- Mar. 23, Supplemental affidavit of Defense raising Questions of Law, filed.
- [fol. 2]
- Apr. 16, 1923. Argued sur Statutory Demurrer.  
May 4, Opinion Dickinson, J., granting leave to file affidavit of defense in 15 days, filed.  
18, Argued sur Motion for extension of time for filing affidavit of defense—Eo die ordered that defendant have an extension of 30 days for filing affidavit of defense.
- July 7, Affidavit of Defense, filed.  
18, Præcipe to place case on Trial List, filed.

Oct.	29,	Stipulation of counsel waiving Jury Trial, filed.
Nov.	28,	Trial before Court without a Jury—Witnesses sworn.
Jan.	4, 1924.	Argued sur pleadings and proofs.
	14,	Opinion, Dickinson, J., filed.
Feb'y.	25,	Judgment in favor of plaintiff in \$21,372.11, filed.
May	7,	Certificate that jurisdictional question is involved, filed.
	7,	Assignments of error, filed.
	7,	Petition for Writ of Error to Supreme Court, filed.
	7,	Order of Court granting prayer of petition, filed.
	8,	Writ of Error allowed and copy thereof lodged in Clerk's Office for adverse party.
	8,	Citation allowed and issued.
	12,	Citation returned—service accepted and filed.
	26,	Præcipe as to transcript of record sur Writ of Error, filed.
	26,	Testimony, filed.

[fol. 3]

## IN UNITED STATES DISTRICT COURT

## WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the Judgment of a plea which is in the said District Court before you, or some of you, between The Archibald McNeil & Sons Co., Inc., plaintiff, and United States of America, defendant, a manifest error hath happened to the great damage of United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at the City of Washington within thirty days, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Wm. Howard Taft, Chief Justice of the Supreme Court of the United States at Philadelphia, the eighth day

of May, in the year of our Lord one thousand nine hundred and twenty-four.

George Brodbeck, Clerk United States District Court, Eastern District of Pennsylvania. (Seal of the District Court of the United States, E. D. Penna.)

Allowed by the Court. O. B. Dickinson, J.

[fol. 4]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF CLAIM—Filed Nov. 11, 1922

The Plaintiff, The Archibald McNeil & Sons Company, Inc., a corporation organized and existing under the laws of the State of Connecticut, claims to recover of the defendant the sum of seventeen thousand four hundred twenty two dollars and thirty two cents (\$17,422.32), together with further compensation amounting to legal interest thereon, as hereinafter set forth, all of which is justly due and owing by the defendant to plaintiff upon a cause of action whereof the following is a statement:

I. Jurisdiction of this action arises under the Fifth Amendment to the Constitution of the United States and under the tenth section of the Act of Congress approved August 10th, 1917, 40 Stat. 276, commonly known as the Lever Act.

II. Plaintiff was at the times of the transaction hereinafter recited engaged in buying, selling and shipping bituminous coal chiefly for export to foreign countries. All of the coal hereinafter referred to and which is the subject matter of this suit was purchased by plaintiff under good and valid contracts made long prior to October 30, 1919, and had been sold by plaintiff for export prior to October 30, 1919. Plaintiff had procured its shipment by his vendor, the Jamison Coal & Coke Company to tidewater for export early in October 1919, and prior to October 30, 1919, it was lying either at Port Richmond Piers, Philadelphia, or at Port Reading Piers, New Jersey, whither it had been sent by the Railroad Administration through [fol. 5] its agents.

III. By virtue of the authority conferred by the aforesaid Act of Congress, the President of the United States, acting by and through the Fuel Administrator at Port Richmond Piers, Philadelphia, or at Port Reading Piers, New Jersey, commandeered and requisitioned a certain necessary fuel, namely, bituminous coal, owned by the plaintiff at the times and in the quantity set forth in a true and correct statement thereof hereto attached and made a part hereof, marked "Exhibit A".

The said coal was commandeered and requisitioned from or through the Commissioner of the Tidewater Coal Exchange, the Su-

perintendent of Transportation of the Philadelphia & Reading Railroad Company, the Shipping and Freight Agent of the United States Railroad Administration at Port Reading Terminal Piers, New Jersey, the Bituminous Coal Distribution Committee, the Regional Coal Committee, the Philadelphia & Reading Railroad Company, the Port Reading Railroad Company, the Federal Treasurer at Port Reading Terminal Piers of the United States Railroad Administration, and the Jamison Coal & Coke Company, the vendors of the said coal to the plaintiff.

All of the aforesaid coal was received, accepted, retained and used by the United States of America, and used in the operation of various railroads, to wit: Boston & Maine Railroad, Maine Central Railroad; which said use was a public use connected with the common defense.

IV. The said coal was purchased and held at the said piers by plaintiff for export, and the fair and reasonable values and true market prices of said coal so commandeered and requisitioned as aforesaid, at the times and places and in the quantities as aforesaid, were as stated in "Exhibit A" hereto attached; and were not less than the price assumed to be fixed by the Fuel Administrator for New River Coal for export, to wit: \$4.536 per gross ton f. o. b. mines.

[fol. 6] V. During the whole of the period during which said coal was commandeered and requisitioned from plaintiff, there was a ready and constant market for said coal at said Port Richmond Piers and Port Reading Piers, where said requisitions were made from plaintiff, and said coal was then and there being continuously sold in large quantities.

VI. Plaintiff avers that the best measure of just compensation for private property commandeered and requisitioned by the United States of America as in the present case, is the fair market value thereof at the time and place of delivery as shown by the current market price in transactions of purchase and sale. Plaintiff avers that fair market values and current market prices of the coal commandeered and requisitioned by the United States as aforesaid, are as stated in "Exhibit A" hereto attached. But plaintiff further avers that the said coal had been sold by plaintiff for export prior to October 30, 1919, and that the net prices at which plaintiff so sold were in excess of said price of \$4.536 per gross ton f. o. b. mines; and that if a market as averred did not exist as alleged and believed, plaintiff is entitled to recover the said net prices at which plaintiff had sold.

VII. Plaintiff avers that it is entitled to just compensation which is the monetary equivalent of its property at the time of the delivery thereof, pursuant to the commandeering or requisitioning thereof. Payment in full not having been made at said time plaintiff avers that its right to just and full compensation as of said dates of delivery requires the allowance of compensation or

damages suffered by reason of delay in payment. Plaintiff avers that by reason of such delay in payment, it is entitled to compensation at the rate of six per cent per annum on the amount due for each requisition, from the respective dates of delivery, and that said rate of six per cent per annum is the fair and reasonable value for the retention of the money during the period covered by this claim.

[fol. 7] VIII. Plaintiff avers that it has made for the space of three years every effort to collect the value of the said coal so commandeered and requisitioned, and that no part of said sum has been paid by or on behalf of defendant to plaintiff, and that the whole of said sum, together with compensation for the detention thereof, is still justly due and owing by defendant to plaintiff.

Wherefore plaintiff brings this suit.

The Archibald McNeil & Sons Company, Inc., by (Sgd.)  
Adam Hugo, Treasurer.

[fol. 8] "EXHIBIT A" TO STATEMENT OF CLAIM

Coal Requisitioned by Fuel Administrator

Dates, 1919	Gross tons	Market prices f. o. b. mines	Amount
Nov. 12.....	828.16	\$4.536	\$3,756.53
Nov. 17.....	753.66	4.536	3,418.60
Nov. 18.....	1,397.37	4.536	6,338.47
Nov. 26.....	337.40	4.536	1,530.45
Nov. 29.....	288.31	4.536	1,307.77
Dec. 16.....	236.	4.536	1,070.50
	<hr/> 3,840.90		<hr/> \$17,422.32

Notices of said requisitions were given under dates of December 12, 1919, and December 18, 1919.

[fol. 9] Jurat showing the foregoing was duly sworn to by Adam Hugo omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

SPECIAL APPEARANCE FOR DEFENDANT—Filed Dec. 16, 1922

SIR: Enter my appearance conditionally and specially for the purpose of moving to dismiss the action brought in the above entitled case for want of jurisdiction.

George W. Coles, United States Attorney, appearing for the defendant conditionally and especially for the purposes of the above motion only.

To the Clerk U. S. D. C., E. D. of Pa.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed Dec. 16, 1922

And now, to wit: December 16, 1922, comes the defendant, the United States of America, by its attorney in and for the Eastern District of Pennsylvania, and moves the court to dismiss the Statement of Claim filed in the above entitled matter for the following reason:

The Statement of Claim filed by the plaintiff discloses the fact that the plaintiff is a Connecticut Corporation, and a citizen and resident of that State, and by reason thereof the action herein has been brought in the wrong District.

George W. Coles, United States Attorney.

Philadelphia, Pa.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

Sur Motion to Dismiss

OPINION—Filed Feb. 15, 1923

DICKINSON, J.:

The broad subject of jurisdiction has many phases. One is that of venue. This means essentially the question of whether a particular Court is the one vested with authority to adjudicate the cause. This is the question here raised. We begin with the proposition that the United States is not suable in any Court unless Congress has so en-

acted and then only in the Court which Congress has designated and in accordance with the conditions it has imposed.

The general proposition is of course true as applied to the exercise of jurisdiction in any case. A court may have jurisdiction in the broad sense of jurisdiction of the subject matter, or of the litigants, or it may not. The appropriate phrase in which to express this phase of the thought of jurisdiction is the possession of the judicial power. The judicial power of Courts of the United States extends "to controversies to which the United States shall be a party." The particular proposition, however, is much narrower than this. It is built upon the ground of the immunity of the sovereign, and this is wholly independent of the other question of judicial power except that as this Court has general jurisdiction in controversies to which the United States is a party if in consenting to the bringing of a particular action Congress did not designate the Court which should entertain it, the inference would be a fair one that it was intended that any Court which has this general jurisdiction might try the [fol. 13] cause. The question thus becomes one, the answer to which must be sought in the Acts of Congress.

### The Legislation

Congress has permitted actions to be brought against the United States and judgment may be rendered therein. One such enactment is the Tucker Act. All are agreed that actions under the Tucker Act can only be brought in the District of the plaintiff. If this action has been brought by virtue of the consent of Congress as expressed in the Tucker Act, it follows that it must be dismissed because this Court is without authority to try it.

There is, however, another Act, known as the Lever Act, approved August 10th, 1917, Section 10, of which confers the right to bring an action against the United States without condition limiting the right to any district.

### The Facts of the Case

The facts of this case, as disclosed by the proceedings, are that the plaintiff is a citizen of another State and not an inhabitant of this District. It also shows that the cause of action arises out of Section 10 of the Lever Act.

### Discussion

The whole discussion is thus centered upon the answer to the question of whether the consent of the United States to be sued for a cause of action arising under the Lever Act is given by that Act or the Tucker Act. The case of *United States vs. Pfitch*, 256 U. S. 547 decides the question. The exact question which arises here was there presented. If the District Court there had jurisdiction of the action before it merely because it was a District Court having jurisdiction of the parties, no right to a writ of error direct to the Supreme

Court existed. If its authority to try the case was conferred by the [fol. 14] provisions of the judicial code which gave the District Courts concurrent jurisdiction with the Court of Claims up to a limited sum, a writ of error might properly issue from the Supreme Court directly to the District Court. The right of action there, as here, was given by the Lever Act. The writ of error had issued direct to the District Court. It was dismissed for want of jurisdiction. Translated into terms of the instant case the ruling means that this Court has jurisdiction as a District Court and is not restricted to the limited and special jurisdiction conferred by the Tucker Act.

We see nothing to be gained by pursuing the argument addressed to us upon the subject of the possession by this Court of this general jurisdiction.

We are unable to see any bearing which the distinction drawn between the jurisdiction of the Court and methods of procedure has upon the question before us. The question is wholly one of jurisdiction, and it would seem to be conceded that this Court has it. When any question arising under procedural law is raised, it will be determined. All that the National Casket Company vs. U. S. 263 Fed. Rep. 246, decides is that the service of the writ was in that case not in accordance with the law, and the motion to set the service aside was granted. The very jurisdiction which is here questioned was there conceded. If the case is cited merely as authority for the doctrine that there is a distinction between jurisdiction and the procedure to be followed, the distinction is established. This leaves untouched however, the question before us which is wholly one of jurisdiction.

The motion to dismiss is denied.

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[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S EXCEPTION TO REFUSAL OF MOTION TO DISMISS—Filed  
Feb. 28, 1923

And now, to wit: this 24th day of February, A. D. 1923, comes George W. Coles, Esq., United States Attorney for the Eastern District of Pennsylvania, for the defendant, and excepts to the opinion of the Court filed dismissing Defendant's motion to dismiss for want of jurisdiction.

George W. Coles, United States Attorney.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DEFENSE RAISING QUESTIONS OF LAW—Filed Feb.  
28, 1923

The defendant, United States of America, by George W. Coles, United States Attorney for the Eastern District of Pennsylvania, files this Affidavit of Defense raising questions of law as follows:

1. The Statement of Claim filed fails to set forth a cause of action against the United States of America, cognizable in this court.

2. The Act of Congress of August 10, 1917, (40 Stat. L. 276) Section 10, does not confer on District Courts of the United States jurisdiction to try any and all claims arising under the Act.

3. The District Courts of the United States have jurisdiction under the Act only after:

(a) A determination by the President of the value of the property taken thereunder.

(b) An expression that the compensation so determined is not satisfactory to the person entitled to receive the same.

(c) The payment to the claimant of 75% of the amount so determined by the President.

[fol. 17] 4. The only controversies of which the District Court has jurisdiction under the said Act of Congress are suits against the United States "to recover such further sum as added to the said seventy five per centum will make up—just compensation."

5. The District Court does not have jurisdiction to try the claim of the Plaintiff as filed.

Wherefore the defendant prays the judgment of the Court upon the questions of law herein raised and if these are sustained that judgment may be entered for the defendant. If, however, the questions of law are decided adversely to the defendant, the defendant prays leave to file an Affidavit of Defense to the averments of fact contained in the Statement of Claim.

George W. Coles, United States Attorney.

[fol. 18]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF DEFENSE RAISING QUESTIONS OF LAW  
—Filed Mar. 23, 1923

The defendant, United States of America by George W. Coles, United States — for the Eastern District of Pennsylvania files this Supplemental Affidavit of Defense raising questions of law, assigning the following reasons in support of the affidavit of defense raising questions of law heretofore filed:

6. The complaint sets forth a diversion of coal and the provisions of Section 25 of the Lever Act instead of a requisition under Section 10, of the said Act.

7. Plaintiff's remedy, if any, was by a suit against the Agent designated by the President under section 206 (a) of the Transportation Act.

Wherefore, the defendant prays the judgment of the Court upon the additional questions of law herein raised and these are sustained that judgment may be entered for the defendant. If, however, the questions of law are decided adversely to the defendant the defendant prays leave to file an Affidavit of Defense to the averments of fact contained in the Statement of Claim.

George W. Coles, United States Attorney.

[fol. 19]

[Title omitted]

SUB AFFIDAVIT RAISING QUESTIONS OF LAW—Filed May 4, 1923

OPINION

DICKINSON, J.:

The First Question

Starting with the doctrine, which is of course accepts that this defendant is subject to the jurisdiction only of that tribunal to whose jurisdiction it has submitted, and that a Court of the United States has only that jurisdiction which the Constitution and laws of the United States have conferred, the first point made (assuming the question of jurisdiction in respect to the proper forum to have been for present purposes determined) is that the Act of Congress of August 10th, 1917 commits to the District Courts the duty of determining to what sum a claimant is entitled only when there has been a taking by the United States and then only when there has been an appraisalment and a payment on account, thereby limiting the judicial power to the ascertainment in the words of the Act of the "further sum", which added to what was paid at the time of the

taking will together "make up just compensation". Inasmuch as there is no averment of a payment on account nor of an appraisalment, the point made is embraced in the inference drawn that this is not [fol. 20] the character of case, jurisdiction to try which is conferred upon any District Court by the cited Act of Congress.

The verbiage of the Act gives support to the position of the defendant. This literal interpretation, however, does not give us the real meaning of the law. It contemplates a taking of private property for public uses. It recognizes the constitutional right of the owner to "just compensation" and of the possible need of some tribunal to determine it. For this Congress has provided by making it the duty of any District Court, to which application may be made to try the cause. The provisions as to appraisalment and payment of the stated percentage was inserted independently of the other question of how "just compensation" was to be determined and was wholly for the benefit of the owner of the property taken. The requirement to pay him the percentage is made absolute and of course the phraseology of the Act implies the partial payment because it was assumed the mandate of the law would be met. Our view however is that the failure of the Executive to follow the directions of Congress does not oust the jurisdiction conferred upon the Courts. They are to determine what sum of money is "just compensation" for the property taken and are to award to the claimant such sum, less, of course, what has been paid. It may be, as counsel for defendant contend, that the words of the Act limit the form of the judgment to one for the retained percentage of "just compensation", leaving the complainant to some other method of getting the sum which Congress has commanded should have been paid on account. This at the most is a trial question which may be ruled as such.

We find no support of the position of the defendant in the cases cited. It is true that in each of these cases there had been a payment on account. There was no room in any of these cases for the [fol. 21] proposition for which defendant stands that the oversight or neglect of the Executive to do what Congress had commanded ousts the jurisdiction conferred upon the District Courts. The circumstances that the rulings made are silent upon a point which could not have been raised does not warrant any inference of what the ruling would have been had the question been raised.

In *United States vs. McGrane*, 270 Fed. Rep., 761 no such question arose.

*Benedict vs. United States*, 271 Fed. Rep., 714 does not discuss the question.

Nor does *Blake vs. U. S.*, 275 Fed. Rep. 861.

The point in *Greenwich vs. United States* (unreported) was or at least included one essentially different from that now raised, although in some respects akin to it. There was no ruling made by the Court so that there is no guide to us upon the point now made. So far as it bears directly upon the question before us, it supports the jurisdiction of the Court because in that case nothing had been paid and yet the case was not dismissed for want of jurisdiction. The kindred question to which we have referred is one not here raised, and in view of the averments of the declaration could not be raised.

We find the conclusion reached to which the foregoing points *is* confirmed by the cases to which we have been referred by counsel for plaintiff. These cases are

United States vs. New River, 276 Fed. Rep. 690.

Seaboard vs. United States, 280 Fed. Rep., 349.

The latter case, on appeal to the Supreme Court, was disposed of in an opinion handed down March 5th, 1923.

These cases are wholly inconsistent with any thought that the [fol. 22] District Courts do not have the judicial power to determine what is just compensation in the case of an actual taking.

This takes us to the second question raised.

### The Second Question

The second question may most clearly be presented by having it arise out of a short fact statement.

From the viewpoint of defendant the 10th Section of the Lever Act has application to what is in effect the exercise of the power of eminent domain. It contemplates a requisition; unsuccessful efforts to agree upon compensation; a determination by the United States of the sum it would willingly pay and the payment of 75% of that sum on account. The owner of the property which has been taken is then given the right to have his compensation judicially determined, and the duty is imposed upon the District Courts to determine it.

Section 25 of the Act contemplates a wholly different situation. It does not relate to a taking by the United States in the eminent domain sense but the interposition of the aid of the United States in dealing with transportation and supply of fuel under war conditions. Whatever the United States does under Section 25 is an administrative act done in furtherance of the business of transportation companies for them, and in consequence an act to be viewed in law as the act of the Transportation Company.

The point concedes that ultimately the responsibility of payment rests upon the United States, but it is urged that the method of recovery which Congress has indicated and which, for this reason, must be followed is to bring an action against the designated agent who [fol. 23] is the representative of the United States in respect to the particular transportation company concerned.

The inference drawn is that any one who has a right of recovery under Section 25 must pursue it and have the sum payable determined in such an action.

The reply made by the plaintiff is that the question thus raised has already been determined in favor of the plaintiff. The point raised is made to bear upon the facts of the instant case by the observation that although the declaration formally avers a taking under the 10th Section, the declaration as a whole makes it clear that the real fact is that there was no taking under the right of eminent domain within the meaning of the 10th Section but that the complaint is of an administrative act which resulted in a diversion of the shipment from one consignee to another. The answer of the plaintiff to the point made is that it has already been ruled.

The first case cited is *Dexter vs. United States*, 275 Fed., 566. Judge Morris, in a fully considered opinion, meets the precise question raised. The case was that of demurrer to a petition which set forth a diversion of coal from the consignee to the Pennsylvania Railroad. The authority was that of a requisition by the Director General of the Railroads "acting under an order of the United States Fuel Administrator." The cause of action, as we read that case, was the very cause of action here set forth, and the question raised by the demurrer was the very question here made. The Court there made the finding that this was a taking under the 10th Section of the Lever Act, and overruled the demurrer interposed.

The second case cited was that of *Corona Coal Co. vs. United States*, 56 Court of Claims Reports, 390. The effort of the claimant [fol. 24] there was to recover under Section 25 of the Lever Act. The very question raised before us by the United States was there raised in reverse, the United States contending that the recovery could be only under Section 10 of the Lever Act. The Court ruled that the Court of Claims had no jurisdiction, and referred the claimant to the District Court.

*General Chemical Co. vs. United States* Court of Claims No. 34,140, decided January 23rd, 1922, is cited to the same effect.

We have not had access to the report of these Court of Claims cases but accept the statement of counsel as to the rulings made.

In view of this, or indeed of the ruling made by Judge Morris alone, we deem it our duty to apply the same determination to the instant case until it had been authoritatively ruled otherwise. It would be an intolerable situation to permit cases of *of* this character to be brought in one District and for the Court of another District to refuse to entertain them.

We withheld a definite ruling upon this point awaiting a supplemental brief of counsel for the defendant. We are now in receipt of this brief and find that this second question is withdrawn so far as it is comprehended under Paragraph 6 of the affidavit of defence raising these questions of law.

The Paragraph is as follows:

"6. The complaint sets forth a diversion of coal under the provisions of Section 25 of the Lever Act instead of a requisition under Section 10 of the said Act."

Counsel for defendant, however, still presents the question of law raised by paragraph 7 of their affidavit.

This paragraph is as follows:

"7. Plaintiff's remedy, if any, was by a suit against the Agent designated by the President under Section 206 (a) of the Transportation Act."

[fol. 25] We are unable to find any substantial difference (in the light of the above cited cases) between the question raised by Paragraph 6 and Paragraph 7. The distinction is clear enough between the cases in which the United States under its power of

eminent domain takes property for its own purposes and another cause of action which may arise out of an administrative act of the executive relating to an interference with the course of a shipment. The argument based upon this is likewise easily grasped that in the one case Congress has made it the duty of the District Courts to determine the just compensation to which an owner of property taken by the United States for its own use is entitled, but that a claim arising out of such an administrative act is a claim, the legal justice of which the District Courts (otherwise than in special cases) have not had it made their duty to determine. This view, however, would seem to ignore the point of the ruling made in the cited cases.

The declaration in the instant case avers a taking under Section 10 of the Lever Act. It is true that this is accompanied with other averments which makes it clear that the taking was in the form of a diversion of the property from the control of the owner to the possession of some one else designated by an executive administrative act. Such diversion, however, is the very thing which was held in the cited cases to be a taking under Section 10. The point now made by counsel for the United States is that it was not such a taking. The differentiation between the point now pressed and the rulings in the cited cases is that the transportation Act of 1920, being subsequent and in this respect supplementary to the Lever Act, by Section 206 (a) provides that a taking (although a taking under the power of eminent domain and therefore a [fol. 26] taking under Section 10 of the Lever Act as was held in the cited cases) if it was a taking for the purpose of being diverted to some one designated by the executive was the kind of a taking, the remedy for which was by action against the administrative agent of that railroad to which the coal was diverted. The argument does not go beyond procedure features.

The ultimate liability of the United States is not denied. The point made is that Congress by Section 206 (a) of the Transportation Act laid down a policy of the law and a mode of redress which claimant of this particular character should have precisely as by the Lever Act, Congress has prescribed the mode of redress which the plaintiff in this case has pursued.

Our attention has been directed to the practical value of the policy thus adopted by Congress. Under Section 25 of the Lever Act there may have been any number of diversions. The divertees may be scattered all over the United States. The United States being subject to suit under Section 10 of the Lever Act, all these causes of action could be redressed in one action in any District Court of the United States. The practical inconvenience of this was recognized by Congress, and it was accordingly provided by Section 206 (a) of the Transportation Act that in cases of this particular kind of taking the action should be brought not against the United States but against the particular railroad which benefited by the diversion, or more accurately, against the designated agent of such railroad. This has brought it about that an action for taking for the purposes of a diversion would properly be

brought precisely as for a cause of action arising in the course of the operation of the railroad by the United States. It is further [fol. 27] then pointed out that this point was not made nor is the thought met by anything in the cited rulings. The argument takes us first to the Section 206 (a) of the Transportation Act.

### The Final Question

The question we have so designated is final in more respects than one. It is in effect an abandonment of the other positions taken inasmuch as the reliance is now upon the soundness of the proposition that although there is a taking and although that taking is by authority of Section 10 of the Lever Act, Section 206 (a) of the Transportation Act, a later date enactment, differentiates between the two kinds of taking which there may be under the Lever Act and prescribes that in cases of a direct taking of property for the use of the United States, the District Courts may determine the just compensation to which the claimant is entitled, but prescribes also that in cases of what may be called an indirect taking, not for the use of the United States but in the furtherance of the governmental purpose to control transportation, the rights of the claimant shall be determined not through the form of an action against the United States, as it would be under the provisions of the Lever Act, but in the form of what is the equivalent of an action against the particular Transportation Company which has been the recipient of the benefits of the governmental intervention.

As before twice stated there is no denial of the ultimate liability of the United States. The proposition goes only to the procedural right. We recognize the force of the argument which supports the doctrine underlying the proposition advanced. The argument has support not merely in the verbiage of the Act of Congress but [fol. 28] also in the practical policy which it can be understood as the motive for enactments having the interpretation thus given to them and which dictated the language employed by Congress. This argument, however, had full application in the cited cases which have been determined and without doubt was given due weight before the conclusion reached was announced.

With respect to what we have called the final question, we see no room for a distinction between the Dexter case and the case at bar, and as a consequence feel impelled, for reasons which lie upon the surface, to follow the ruling made.

### Order

We accordingly decline to rule the questions of law raised by the affidavit in favor of the defendant, but grant leave to it to file an affidavit, directed to the fact merits of the case, within fifteen days from the date of the filing of this order.

[Title omitted]

## AFFIDAVIT OF DEFENSE—Filed July 7, 1923

The United States of America, defendant, by George W. Coles, Esq. United States Attorney for the Eastern District of Pennsylvania claims that it has a full, just and complete legal defense to the whole of the Plaintiff's Claim as follows:

I. The allegations in paragraph 1 of the Statement of Claim are neither admitted nor denied, said allegations being conclusions of law. Defendant avers that the Plaintiff has no cause of action against the defendant under Section 10 of the Act of Congress, approved August 10, 1917, 40 Stat. 276, commonly known as the Lever Act, for reasons as will hereinafter appear, that no action was taken by the Plaintiff against defendant under said section of said Act of Congress with respect to the subject matter of this suit.

II. The allegations of paragraph 2 of the Statement of Claim are neither admitted nor denied, the defendant having no information relative to said allegations. The defendant avers that no action was taken by it against the Plaintiff under section 10 of the Lever Act, and claims that the allegations of paragraph 2 of the Statement of [fol. 30] Claim are immaterial so far as this suit is concerned.

III. Defendant denies that the President of the United States acting by and through the Fuel Administrator or in any other manner, or through any other medium, commandeered and requisitioned the coal referred to in paragraph 3 of the Statement of Claim.

Defendant avers that the said coal was purchased under contract from F. R. Long & Co. by the Boston and Maine, and Maine Central Railroads, while under federal control, and used by the said railroads for their general transportation purposes and not used in any way in connection with the common defense.

IV. Defendant denies as aforesaid, that said coal was commandeered and requisitioned from the Plaintiff or from any other person or corporation. Said coal, as aforesaid, was purchased under contract from F. R. Long & Co. and the defendant is in no way liable therefor to the plaintiff in this suit, which is based on alleged commandeering and requisitioning of the said coal from the Plaintiff which is herein specifically denied.

V. Defendant denies as aforesaid that said coal was commandeered or requisitioned from plaintiff. Defendant neither admits nor denies that there was a ready or constant market for said coal alleged, this being immaterial in this suit.

VI. Defendant denies as aforesaid that said coal was commandeered or requisitioned from plaintiff. Defendant neither admits nor denies that there was a ready or constant market for said coal

alleged, this being immaterial in this suit. Defendant as aforesaid is nowise liable in this action for said coal.

[fol. 31] VII. Defendant denies that plaintiff is entitled to just compensation or other damage for said coal for the reason as aforesaid that the said coal was never commandeered or requisitioned from the plaintiff. Defendant is in no wise liable to the Plaintiff for the value of the same in this action, said coal having been purchased by the two railroads aforesaid, while under federal control, and the coal never having been commandeered or requisitioned by the President of the United States under Section 10 of the Lever Act as alleged.

VIII. Therefore defendant denies liability to the Plaintiff in this suit.

United States of America, by George W. Coles, United States Attorney.

Sworn to and subscribed before me this 6th day of July, 1923.  
H. R. Manley, United States Commissioner, Eastern District of Pennsylvania. (Seal.)

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[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE JURY TRIAL—Filed Oct. 29, 1923

It is stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in this case may be tried and determined by the Court without the intervention of a jury, in accordance with Sections 649 and 700 of the United States Revised Statutes.

(Sgd.) George W. Coles, United States Attorney. Charles H. Burr, Attorney for ———.

Philadelphia, Pa.

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[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXHIBIT IN EVIDENCE

Before Hon. Oliver B. Dickinson, J., Without a Jury

Philadelphia, Pa., November 28, 1923.

Present: Charles H. Burr, Esq., and George Demming, Esq., for plaintiff; Joseph L. Kun, Esq., Assistant U. S. Attorney, for defendant.

## Plaintiff's Evidence

Mr. Burr: If Your Honor please, the defendant admits the incorporation of the plaintiff under the laws of the State of Connecticut.

I offer in evidence the following relative parts of the Statement of Claim and the Affidavit of Defense:

Paragraph II of the Statement of Claim, as follows:

"II. Plaintiff was at the times of the transactions hereinafter recited engaged in buying, selling and shipping bituminous coal chiefly for export to foreign countries. All of the coal hereinafter referred to and which is the subject matter of this suit was purchased by plaintiff under good and valid contracts made long prior [fol. 34] to October 30, 1919, and had been sold by plaintiff for export prior to October 30, 1919. Plaintiff had procured its shipment by his vendor, the Jamison Coal & Coke Company to tidewater for export early in October 1919, and Prior to October 30, 1919, it was lying either at Port Richmond Piers, Philadelphia, or at Port Reading Piers, New Jersey, whither it had been sent by the Railroad Administration through its agents."

Paragraph II of Affidavit of Defense, as follows:

"II. The allegations of paragraph 2 of the Statement of Claim are neither admitted nor denied, the defendant having no information relative to said allegations. The defendant avers that no action was taken by it against the Plaintiff under section 10 of the Lever Act, and claims that the allegations of paragraph 2 of the Statement of Claim are immaterial so far as this suit is concerned."

The last paragraph of the third numbered paragraph of the Statement of Claim, as follows:

"III. \* \* \*

All of the aforesaid coal was received, accepted, retained and used by the United States of America, and used in the operation of various railroads, to wit: Boston & Maine Railroad, Maine Central Railroad; which said use was a public use connected with the common defense."

[fol. 35] The last clause of Paragraph III of the Affidavit of Defense, as follows:

"III. \* \* \*

Defendant avers that the said coal was purchased under contract from F. R. Long & Co. by the Boston and Maine, and Maine Central Railroads, while under federal control, and used by the said railroads for their general transportation purposes and not used in any way in connection with the common defense."

The fourth paragraph of the Statement of Claim, as follows:

"IV. The said coal was purchased and held at the said piers by plaintiff for export; and the fair and reasonable values and true market prices of said coal so commandeered and requisitioned as aforesaid, at the times and places and in the quantities as aforesaid, were as stated in "Exhibit A" hereto attached; and were not less than the price assumed to be fixed by the Fuel Administrator for New River Coal for export, to wit: \$4.536 per gross ton f. o. b. mines."

The fourth paragraph of the Affidavit of Defense, as follows:

"IV. Defendant denies as aforesaid, that said coal was commandeered and requisitioned from the Plaintiff or from any other person or corporation. Said coal, as aforesaid, was purchased under [fol. 36] contract from F. R. Long & Co. and the defendant is in no way liable therefor to the plaintiff in this suit, which is based on alleged commandeering and requisitioning of the said coal from the Plaintiff which is herein specifically denied."

Paragraph V of the Statement of Claim, as follows:

"V. During the whole of the period during which said coal was commandeered and requisitioned from plaintiff, there was a ready and constant market for said coal at said Port Richmond Piers and Port Reading Piers, where said requisitions were made from plaintiff, and said coal was then and there being continuously sold in large quantities."

Paragraph V of the Affidavit of Defense, as follows:

"V. Defendant denies as aforesaid that said coal was commandeered or requisitioned from plaintiff. Defendant neither admits nor denies that there was a ready or constant market for said coal alleged, this being immaterial in this suit."

Paragraph VI of the Statement of Claim, as follows:

"VI. Plaintiff avers that the best measure of just compensation for private property commandeered and requisitioned by the United States of America as in the present case, is the fair market value thereof at the time and place of delivery as shown by the current market price in transactions of purchase and sale. Plaintiff avers [fol. 37] that fair market values and current market prices of the coal commandeered and requisitioned by the United States as aforesaid, are as stated in "Exhibit A" hereto attached. But plaintiff further avers that the said coal had been sold by plaintiff for export prior to October 30, 1919, and that the net prices at which plaintiff so sold were in excess of said price of \$4.536 per gross ton f. o. b. mines; and that if a market as averred did not exist as alleged and believed, plaintiff is entitled to recover the said net prices at which plaintiff had sold."



Paragraph VI of the Affidavit of Defense, as follows:

"VI. Defendant denies as aforesaid that said coal was commandeered or requisitioned from plaintiff. Defendant neither admits nor denies that there was a ready or constant market for said coal alleged, this being immaterial in this suit. Defendant as aforesaid is no wise liable in this action for said coal."

I also offer in evidence the first paragraph of Paragraph III of the Statement of Claim, with the exhibit thereto attached, as follows:

"III. By virtue of the authority conferred by the aforesaid Act of Congress, the President of the United States, acting by and through the Fuel Administrator at Port Richmond Piers, Philadelphia, or at Port Reading Piers, New Jersey, commandeered and requisitioned a certain necessary fuel, namely, bituminous coal, owned by the [fol. 38] plaintiff at the times and in the quantity set forth in a true and correct statement thereof hereto attached and made a part hereof, marked "Exhibit A".

"EXHIBIT A TO EXHIBIT IN EVIDENCE

Coal Requisitioned by Fuel Administrator

Dates, 1919	Gross tons	Market prices f. o. b. mines	Amount
Nov. 12.....	828.16	\$4.536	\$3,756.53
Nov. 17.....	753.66	4.536	3,418.60
Nov. 18.....	1,397.37	4.536	6,338.47
Nov. 26.....	337.40	4.536	1,530.45
Nov. 29.....	288.31	4.536	1,307.77
Dec. 16.....	236	4.536	1,070.50
	<u>3,840.90</u>		<u>\$17,422.32</u>

Notices of said requisitions were given under dates of December 12, 1919, and December 18, 1919."

I also offer in evidence the first paragraph of Paragraph III of the Affidavit of Defense, showing no contradiction of the figures set forth in the said exhibit, as follows:

"III. Defendant denies that the President of the United States acting by and through the Fuel Administrator or in any other manner, or through any other medium, commandeered and requisitioned the coal referred to in paragraph 3 of the Statement of Claim."

[fol. 39] Now, if your Honor please, we have here a list of all the documents which have been agreed to by Mr. Kun and myself for admission.

I offer in evidence telegram from O. W. Stager to O. H. Hagerman, Port Richmond, Dated November 10, 1919.

(Copy of telegram marked "Plaintiff's Exhibit 1.")

I offer in evidence, as "Plaintiff's Exhibit 2," letter from Wm. Brown, Shipping & Freight Agent, to O. W. Stager, under date of December 12, 1919, with attached list of car numbers which counsel for plaintiff and counsel for defendant agree are the car numbers making up the amounts set forth in the exhibit attached to plaintiff's claim, with the exception that the total amount of tonnage to be recovered is 3,757 tons.

I offer in evidence, as "Plaintiff's Exhibit 3," a letter from Wm. Brown to O. W. Stager, under date of December 18, 1919.

I offer in evidence, as "Plaintiff's Exhibit 4," telegram from G. N. Snider to J. W. Howe, under date of November 8, 1919.

I offer in evidence, as "Plaintiff's Exhibit 5," letter from J. W. Howe, Commissioner, to G. N. Snider, under date of November 10, 1919.

I offer in evidence, as "Plaintiff's Exhibit 6," telegram from L. W. Baldwin, Regional Director, to J. W. Howe, under date of November 11, 1919.

[fol. 40] I offer in evidence, as "Plaintiff's Exhibit 7" telegram from J. W. Howe, to L. W. Baldwin, Regional Director, under date of November 11, 1919.

I offer in evidence, as "Plaintiff's Exhibit 8," telegram from W. T. Lamoure, to J. W. Howe, under date of November 14, 1919.

I offer in evidence, as "Plaintiff's Exhibit 9," seven orders of Tidewater Coal Exchange directed to Wm. Brown, Acting Agent, Port Reading Coal Pier, under dates of November 8, November 8, November 15, November 15, November 15, November 25 and December 12, 1919, under which the cars were included which are set forth in "Plaintiff's Exhibit 2."

I offer in evidence as "Plaintiff's Exhibit 10" five telegram- from W. T. Lamoure, to J. W. Howe, Commissioner, Tidewater Coal Exchange, numbered respectively 1318, 1481, 1519, 1620 and 739.

I offer in evidence, as "Plaintiff's Exhibit 11," order from L. W. Baldwin, Regional Director, to Charles H. Ewing, Federal Manager, dated November 8, 1919.

Mr. Kun: If the court please, I object to the introduction in evidence of the exhibits offered on the ground that they are irrelevant, and immaterial in this suit, the suit being one under Section 10 of the Lever Act, and the exhibits offered showing on their face that they were not requisitions, to use the language of Section 10, "by the [fol. 41] President for supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense," the right to requisition under Section 10 of the Lever Act being limited to the purposes which I have just stated.

The Court: As the objection made is for the purpose of raising a question which goes to the rights of the present action, we will now

admit the evidence subject to the objection, reserving the right and power to rule upon it along with any other questions of law or fact which may arise in the cause and then determine whether the evidence is admissible or inadmissible, allowing now an exception to that party against whom the final ruling may be made, and passing upon it, if the evidence is inadmissible, as upon a motion to strike it out.

Mr. Burr: It is admitted between counsel for the plaintiff and the defendant that the offices held by the various parties signing the documents already offered in evidence were as follows:

J. W. Howe, Commissioner Tidewater Coal Exchange.

L. W. Baldwin, Regional Director of the United States Railroad Administration.

W. T. Lamoure, Chairman of the Subcommittee of the Eastern Regional Coal Committee, located at Boston.

The Court: What is the Coal Committee?

[fol. 42] Mr. Burr: Mr. Robertson can explain that.

Mr. Robertson: The Coal Committee was one of several organized by the Director General of Railroads to carry out the instructions contained in the Fuel Administrator's order of October 31, 1919.

Mr. Burr: And the same statement applies to Mr. Baldwin's office as Regional Director?

Mr. Robertson: Certainly, he was the representative of the Director General of Railroads.

Mr. Burr: To carry out the orders of the Fuel Administrator.

Mr. Robertson: Yes, sir.

Mr. Burr: Who was G. N. Snider?

Mr. Robertson: He was Chairman of the Eastern Regional Coal Committee, located at New York, under the Director General of Railroads, to carry out the orders of the Fuel Administrator.

Mr. Burr: Wm. Brown was Shipping and Freight Agent in charge of the piers at Port Reading.

O. W. Stager was Chairman, Bituminous Coal Distribution Committee at Philadelphia and also Superintendent Transportation, Philadelphia & Reading Railway at Philadelphia.

O. H. Hagerman held the same office at Port Richmond as Mr. Brown held at Port Reading.

[fol. 43] The Court: What does Port Reading mean?

Mr. Burr: Port Reading is the place in New Jersey where the coal went to.

I offer in evidence, as "Plaintiff's Exhibit 12," telegram addressed to L. W. Baldwin, Regional Director, Allegheny Region, signed by Walker D. Hines, Director General of Railroads, under date of October 31, 1919.

I also offer in evidence as "Plaintiff's Exhibit 12-a," letter accompanying copy of said telegram and explaining same, signed by L. W. Baldwin, Regional Director, and addressed to certain Federal Managers, under date of November 1, 1919.

Mr. Kun: I make a like objection to this offer as in the case of the previous offers.

The Court: A like ruling will apply.

RICHARD A. C. MAGRUDER, sworn and examined as follows:

Mr. Kun: I ask for an offer of proof.

Mr. Burr: I offer to prove by this witness that he was the Deputy Commissioner of the Tidewater Coal Exchange during the period that is concerned in the suit; that he was the operating head in New York of the Tidewater Coal Exchange during this period. I desire to show by this witness the method under which the Tidewater Coal [fol. 44] Exchange operated, its nature, and functions, for the purpose of showing how, physically, the handling of the coal which is the subject of the documents already offered in proof was done.

Mr. Kun: This offer is objected to on the ground that it has not been offered to be shown that the exchange of which the witness was the head was in any way authorized by the President to participate in the requisitioning of the coal in question, as necessary to the support of the Army or the maintenance of the Navy or any other public use connected with the common defense.

The Court: A like ruling to the ruling made on the previous offers will apply here.

By Mr. Burr:

Q. Mr. Magruder, we will begin, I think, by asking you if you have with you any documents showing the relation of the Government or the Fuel Administrator or the Railroad Administration to the Exchange?

A. I have the rules of the Exchange showing the approval of the Exchange by the Fuel Administration, and I have copies of the orders of the Railroad Administration in connection with the utilization of the exchange for the distribution of coal during the period in question.

Q. Will you produce those orders?

A. This is the rules containing the United States Fuel Administrator's order making the use of the Exchange compulsory.

[fol. 45] Q. Have you any other documents on the question of these rules?

A. That is the only one bears on the rules of the United States Fuel Administration directed to the Exchange. The next is the order of the United States Railroad Administration commandeering the Exchange. That is contained in a letter of November 2, 1919, from L. W. Baldwin, Regional Director, to his Federal Managers.

Mr. Burr: I offer in evidence as "Plaintiff's Exhibit 13," letter from L. W. Baldwin, Regional Director, addressed to certain Federal Managers, under date of November 2, 1919, and point out that this letter directs that the Tidewater Coal Exchange should be utilized for the shipment of coal.

Mr. Kun: A like objection is made to this offer.

The Court: A like ruling will apply.

Mr. Burr: I offer in evidence the order of H. A. Garfield, United States Fuel Administrator, under date of November 6, 1917, relating to the functions of the Tidewater Coal Exchange, together with the

attached copy of the Tidewater Coal Exchange Rules, as "Plaintiff's Exhibit 14."

Mr. Kun: A like objection is made to this offer.

The Court: A like ruling will apply.

By Mr. Burr:

Q. Will you just tell please first your connection with the Tide-[fol. 46] water Coal Exchange and then the history of the Tidewater Coal Exchange, what it was, and its method of functioning?

A. I was employed by the Tidewater Coal Exchange in Washington on July 9, 1917, as Chief Clerk to the Commissioner, located at Washington, and remained in that position until the close of the Exchange on April 30, 1920, having subsequently moved to New York as of May 1, 1919.

The original Tidewater Coal Exchange was created at the request of The Council of National Defense by the shippers and transshippers of bituminous coal and the tidewater railroads handling such coal at the tidewater ports of New York, Philadelphia, Baltimore and Hampton Roads, for the purpose of expediting the release of cars at those ports in the loading of vessels, so as to increase the car supply on the railroads in order to increase the production of coal which was moving and necessary to win the war. The idea was to classify all the coals from the various mines into pools, according to the grades and general characteristics, and have the coal consigned to the Exchange for the account of its owner and generally distributed by the Exchange without regard to the original ownership, in order to avoid delay in waiting for the owner's own coal to arrive for his particular vessel. This was purely a voluntary association at first and commenced to function July 15, 1917, but, as shown in the last exhibit, Dr. Garfield, United States Fuel Administrator, in his [fol. 47] order of November 6, 1917, made it compulsory for all shippers to ship their coal to the Exchange and be governed by its rules, and the tidewater railroads agreed to pay the operating expenses of the Exchange for the benefits they derived therefrom in the way of car saving.

When the Railroad Administration came into existence on January 1, 1918, it approved shortly thereafter of the railroad contracts and continued to support the Exchange until the Railroad Administration went out of existence as of February 29, 1920. Dr. Garfield's order compelling all shipments to go through the Exchange was cancelled as of March 1, 1919, but the Exchange continued in operation until April 30, 1920, by voluntary membership.

On November 1, 1919, as shown by Exhibit 13, the Regional Director of the Allegheny Region of the United States Railroad Administration commandeered the Tidewater Coal Exchange at all three of the Allegheny ports, New York, Philadelphia and Baltimore, for the purpose of aiding in the distribution of coal, giving the Exchange full jurisdiction over the distribution of coal for transshipment. Following this order the Regional Director, through its Coal Committees, provided a form of application, known as "CX" on

which all consumers of coal made application to the Tidewater Coal Exchange for the coal required, naming thereon the coal supplier [fol. 48] through whom they desired to obtain the coal, and this Form CX contained the agreement to pay for the coal. This application would be either approved, modified or disapproved by the Commissioner of the Exchange, J. W. Howe, and, when approved, would be forwarded to the Subcommitteeman at Philadelphia, who, in turn, would forward it, with his recommendation, to the Regional Coal Committee in Philadelphia, which, if it saw fit, would issue a permit to deliver the specified quantity of coal on the order. This permit would be returned to the Tidewater Coal Exchange, which would place the order with the Pier Agent of the railroad company to load the coal on the particular boat for the account of the party making the application or his supplier of coal.

This was the method of handling this coal at New York during this period, but the coal for New England, for a period of five or six weeks, was handled on the direct telegraphic request of W. T. Lamoureaux, Chairman of the New England Subcommittee, located at Boston. On receipt of such telegrams from Mr. Lamoureaux the Exchange would place the orders direct with the pier, without the approval of the Regional Coal Committee at Philadelphia.

#### Cross-examination.

Br. Mr. Kun:

Q. If a railroad under Federal control required coal, would it proceed in any different way from any other corporation to get coal through your Exchange or did they have to go through the same form?

[fol. 49] A. The rules then in existence, as I understand it, the railroad would make its application to the proper Coal Committee, the same as any other consumer.

Mr. Burr: There have been decisions of the United States Supreme Court recently which make me feel that I should ask Your Honor to take judicial notice of the relative orders of the Fuel Administrator which I have had printed, and I will therefore offer in evidence, as "Plaintiff's Exhibit 15" the various orders of the Fuel Administrator which are relevant in this case.

Mr. Kun: I have no objection to that.

Plaintiff rests.

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#### Defendant's Evidence

Mr. Kun: On behalf to the defendant, I introduce in evidence, with the consent of the other side, for the better understanding of the case by Your Honor, a graphic chart which I have had prepared showing the origin of the coal and just how it got to these railroads, and the various typical orders under which it got there.

(Chart and papers attached thereto marked "Defendant's Exhibit 1".)

[fol. 50] The defendant offers to prove, in accordance with the allegation in the Affidavit of Defense that the coal, to cover the price of which the suit is brought, was actually paid for, by the railroads in question who used the coal, to F. R. Long & Co., as whose coal it was diverted to the railroads, the diversion orders already introduced in evidence showing that the coal was ordered dumped into F. R. Long & Co.'s barges by these very orders which are in evidence.

Mr. Burr: We admit the payment to F. R. Long & Co. of certain sums for the coal in suit. I object to the offer of proof on the ground that it is irrelevant to show payment to a third party, and further, that, as a conclusion from the documentary evidence offered, the diversion, as my friend calls it, or requisition, as I call it, was made to the railroads and not F. R. Long & Co.

Defendant rests.

Testimony closed.

[fol. 51]

PLAINTIFF'S EXHIBIT NO. 1

United States Railroad Administration

Director General of Railroads

Philadelphia and Reading Railroad, Atlantic City Railroad, Port  
Reading Railroad

Time Written: 3.17 M.

Mailgram

Phila., November 10, 1919.

O. H. Hagerman, Port Richmond:

Confirming phone order, Reconsign two hundred (200) cars pools 33 and 34 bituminous coal Port Richmond Piers to same consignment Port Reading Piers. Also fifth (50) cars pool 37 bituminous coal to same consignment Port Reading, N. J. with all charges following and issue letter of transfer.

O. W. Stager

Form Ck. HCE. #3.

## PLAINTIFF'S EXHIBIT No. 2

Port Reading, N. J., Dec. 12, 1919.

Our File No. 1-1.

Mr. O. W. Stager, Supt. Transportation.

[fol. 52] DEAR SIR: Eighty-four cars Bituminous coal originally consigned to the Jamison C. & C. Co., at Port Richmond Piers, Phila., and reconsigned to their account at this point, authority Bituminous Coal Distribution Committee, have been reconsigned to Messrs. [F. R. Long & Co.,]\* at this point and dumped over our piers into vessels account last named shipper.

Attached herewith please find car numbers, weights, etc.

Yours truly, Wm. Brown, Shipping &amp; Freight Agent

Copies to Mr. E. B. Crosley,

" P. J. Kelly,

" J. W. Howe,

" Jamison C. &amp; C. Co.,

" F. R. Long &amp; Co.

84 Cars Reconsigned from Jamison C. &amp; C. Co. to F. R. Long &amp; Co.

Int.	No.	Weight	Consignor
B. & O. ....	229575	45.00	Simpson Ck. C. Co.
N. Y. C. ....	302990	39.07	" "
N. & W. ....	91943	40.06	Md. C. C. Co.
C. & O. ....	58328	40.10	Simpson Ck. C. Co.
L. V. ....	15441	40.01	" "
N. H. ....	56598	40.07	" "
Erie ....	23403	44.00	" "
B. & O. ....	21349	41.03	" "
[fol. 53] B. & O.	221471	44.01	Simpson Ck. C. Co.
N. Y. C. ....	414808	42.14	Md. C. Co.
N. Y. O. W. ....	10157	44.01	Simpson Ck. C. Co.
N. Y. C. ....	408158	39.07	" "
B. & O. ....	27605	43.01	Md. C. Co.
W. M. ....	7018	40.03	"
C. & L. ....	2575	44.05	"
N. Y. O. W. ....	18230	44.01	Simpson C. & C. Co.
Rut. ....	10015	42.10	" "
B. & L. E. ....	43630	44.02	" "
B. & O. ....	231747	43.18	" "
Erie ....	32300	44.14	" "
P. & L. E. ....	4306	40.10	" "
C. N. J. ....	63254	47.11	" "
P. & R. ....	74459	45.07	" "

[\*Words enclosed in brackets erased in copy.]

Int.	No.	Weight	Consignor
C. N. J.....	63336	47.11	Simpson C. & C. Co.
C. & O.....	56258	42.08	" "
N. H. ....	120636	46.04	" "
P. L. ....	738591	43.16	" "
Big 4 .....	74347	43.14	" "
H. B. T.....	3580	45.03	" "
P. & R.....	87108	48.19	" "
N. & W.....	78208	43.08	" "
B. & O.....	229776	44.15	" "
D. L. W.....	73543	39.14	Md. C. Co.
[fol. 54] W. M...	8831	41.11	Md. C. Co.
B. & O.....	26027	39.11	" "
B. & A.....	23367	43.12	" "
B. & O.....	131422	44.08	Simpson Ck. C. Co.
C. N. J.....	61923	43.18	" "
B. & O.....	133857	58.13	" "
P. & R.....	26990	30.00	Md. C. Co.
N. Y. C.....	338226	44.18	" "
B. & O.....	222388	43.03	" "
P. & R.....	26257	29.12	" "
B. & O.....	128931	45.13	Simpson Ck. C. Co.
Erie .....	24850	37.06	" "
P. R. R.....	288622	39.10	" "
P. McK. & Y....	62998	47.02	Md. C. Co.
B/4 .....	73528	42.14	" "
B. & O.....	124451	48.11	Simpson Ck. C. Co.
P. & R.....	27174	31.14	" "
H. V. ....	29230	45.14	" "
B. R. & P.....	16283	39.11	" "
B. & O.....	320270	45.13	" "
C. & O.....	24693	44.08	" "
N. Y. C.....	405558	43.19	" "
P. R. R.....	158367	44.03	" "
B. & O.....	24643	42.11	" "
P. L. ....	704911	43.16	" "
[fol. 55] N. & W.	84637	40.03	Simpson Ck. C. Co.
W. M. ....	7524	42.09	" "
P. & R.....	77823	48.13	" "
" .....	77397	49.02	" "
N. & W.....	84927	39.13	" "
P. L. ....	695186	44.14	" "
" .....	702549	44.08	" "
N. Y. C.....	412832	40.10	" "
B. & O.....	125057	42.17	" "
T. O. C.....	28106	43.10	" "
P. R. R.....	253234	43.05	" "
B. R. & P.....	55410	45.19	" "
" .....	40340	44.13	" "
D. L. & W.....	74084	41.01	" "

Int.	No.	Weight	Consignor
L. V. ....	19362	40.17	Simpson Ck. C. Co.
M. C. ....	8714	41.15	" "
B. & O. ....	127448	43.18	" "
B. & L. E. ....	43368	43.10	" "
B. R. & P. ....	42984	44.09	" "
P. & R. ....	85822	42.04	" "
B. & O. ....	320202	45.17	" "
Shaw ....	17593	49.02	" "
P. & L. E. ....	50798	44.11	" "
" .....	51743	43.02	" "
P. L. ....	166495	45.07	" "
[fol. 56] N. & W.	84637	40.03	Simpson Ck. C. Co.
W. M. ....	7524	42.09	" "
P. & R. ....	77823	48.13	" "
" .....	77397	49.02	" "
N. & W. ....	84927	39.13	" "
P. L. ....	695186	44.14	" "
" .....	702549	44.08	" "
N. Y. C. ....	412832	40.10	" "
B. & O. ....	125057	42.17	" "
T. O. C. ....	28106	43.10	" "
P. R. R. ....	253234	43.05	" "
B. R. & P. ....	55410	45.19	" "
" .....	40340	44.13	" "
D. L. & W. ....	74084	41.01	" "
L. V. ....	19362	40.17	" "
M. C. ....	8714	41.15	" "
B. & O. ....	127448	43.18	" "
B. & L. E. ....	43368	43.10	" "
B. R. & P. ....	42984	44.09	" "
P. & R. ....	85822	42.04	" "
B. & O. ....	320202	45.17	" "
Shaw ....	17593	49.02	" "
P. & L. E. ....	50798	44.11	" "
" .....	51743	43.02	" "
P. L. ....	166495	45.07	" "
[fol. 57] P. & R. .	86007	48.15	Simpson Ck. C. Co.

---

3,632.10 Tons

## Waybill

Date		Date	
No. 33.....	10/ 7/19	No. 92.....	10/15/19
32.....	" /15/19	59.....	10/11/19
30.....	10/ 6/19	58.....	10/ 4/19
38.....	10/ 7/19	57.....	10/11/19
47.....	10/ 9/19	84.....	10/15/19
109.....	10/11/19	83.....	10/15/19
61.....	"	81.....	"
85.....	10/15/19	89.....	"
87.....	"	92.....	"
157.....	"	94.....	"
89.....	"	91.....	"
86.....	10/14/19	90.....	"
154.....	10/15/19	88.....	"
155.....	"	128.....	10/14/19
156.....	"	131.....	"
97.....	"	132.....	"
95.....	"	118.....	10/19/19
96.....	"	28.....	10/14/19
93.....	"	78.....	10/13/19

[ fol. 58 ]

Date		Date	
82.....	10/14/19	28.....	10/ 7/19
120.....	"	29.....	"
119.....	"	30.....	"
121.....	"	31.....	"
122.....	"	32.....	"
26.....	10/19/19	16.....	10/ 4/19
25.....	10/14/19	50.....	10/ 9/19
24.....	"	39.....	10/ 8/19
195.....	10/18/19	38.....	"
196.....	"	36.....	"
31.....	10/15/19	88.....	10/15/19
33.....	"	86.....	"
30.....	"	91.....	"
29.....	"	87.....	"
32.....	10/ 7/19	85.....	"
36.....	"	90.....	"
35.....	"	29.....	"
34.....	"	83.....	"
33.....	"	93.....	"
27.....	"		
28.....	"		
26.....	"		
17.....	10/ 4/19		
39.....	10/ 7/19		
38.....	10/ 7/19		
30.....	"		
31.....	"		

[fol. 59]

## PLAINTIFF'S EXHIBIT No. 3

Port Reading, N. J., Dec. 18, 1919.

Our File No. 1-L.

Mr. O. W. Stager, Supt. Transportation.

DEAR SIR: Three cars Bituminous coal originally consigned to Jamison C. & C. Co., at Port Richmond Piers, Phila. and reconsigned to their account at this point, authority Bituminous Coal Distribution Committee, have been reconsigned to F. R. Long & Co., at this point and dumped over piers into vessel's account last named shipper. Below please find car numbers, weights, etc.,

Int.	No.	Wt.	Consignor	Waybill	Date
P. & R.	87178	43.03	Simpson Ck. Co. Co. . . .	No. 62	10/11/19
W. M.	8343	43.09	" . . . .	3	10/ 3/19
C. & C.	1827	35.05	" . . . .	74	10/14/19
		121.17 tons			

Yours truly, Wm. Brown, Shipping and Frt. Agt.

## PLAINTIFF'S EXHIBIT No. 4

Western Union Telegram

Received at ———.

M. 193. CPD. HL. CAK.

UD. New York, N. Y. 731P. Nov. 8 1919.

[fol. 60] J. W. Howe, Commissioner Tidewater Coal Exchange, 149 Broadway, New York City:

In order to expedite handling requisitions for Tidewater coal for New England will hereafter be made direct upon you by W. T. Lamoure Chairman of our Boston subcommittee and should be honored exactly the same as if coming from this committee Please acknowledge and advise if you will handle accordingly file AK183.  
G. N. Snider. 838P.M.

## PLAINTIFF'S EXHIBIT 5

New York City, Nov. 10, 1919.

Mr. G. N. Snider, Coal Traffic Manager New York Central Railroad,  
Grand Central Terminal, New York City.

DEAR SIR: Acknowledging receipt of your wire of the 8th instant stating that in order to expedite handling requisitions for Tidewater

coal from New England, applications will be forwarded direct to me by W. T. Lamouse, Chairman, Boston Committee, and that same should be honored the same as if coming from your Committee.

I think this arrangement will prove satisfactory.

J. W. Howe, Commissioner.

[fol. 61]

PLAINTIFF'S EXHIBIT 6

Dictated over telephone by GK PRR 11.15 a. m.

Philadelphia, Pa., Nov. 11, 1919.

J. W. Howe:

In order to expedite handling, requisition for Tidewater Coal for New England will hereafter be made direct upon you from W. T. La Moure, Chairman, Boston Sub-Committee and should be honored. Please acknowledge receipt and handle accordingly. File C-C-4-1591.

(Signed) L. W. Baldwin, Regional Director.

PLAINTIFF'S EXHIBIT 7

Postal Telegraph & Cable Co.

New York, Nov. 11, 1919—mj, 11:30 a.m.

L. W. Baldwin, Regional Director USRR Administration, Philadelphia, Pa.:

Acknowledging your telegram eleventh file C-C-four dash fifteen ninety one relative requisition for Tidewater coal for New England direct upon me from La Moure.

J. W. Howe.

[fol. 62]

PLAINTIFF'S EXHIBIT 8

Western Union Telegram

Received at — 1919 Nov. 14, am 11 18.

1919, Nov. 14, a. m. 11.09

K28B CAK.

H N Boston Mass 104 5a 14.

J. W. Howe, Commissioner Tidewater Coal Exchange, Singer Bldg., New York, N. Y.:

Following from Regional Committee quote confirming telephone conversation today continue to requisition Tidewater coal just as heretofore but without regard to storage on hand file AK six one four end of quote Please cancel my wire yesterday

W. T. Le Moure.

## PLAINTIFF'S EXHIBIT 9

No. 722

Tidewater Coal Exchange, 611 Singer Building, New York

Date: Nov. 8, 1919.

Mr. Wm. Brown, Acting S. &amp; F. Agent, Port Reading Coal Pier.

DEAR SIR: You are authorized to load for account of F. R. Long  
[fol. 63] 1325 Tons from Pool all #34 bal 33 Boat "Shickshinny."  
(Confirming telephone conversation.)

Credit O. K.

Consigned to Maine Central R. R.

Portland, Me.

Priority A.

Yours truly, J. W. Searles, Deputy Commissioner, per J. T.  
Brower.

Authority of W. T. Lamoure.

Duplicate.

11-c.

No. 723

Tidewater Coal Exchange

Nov. 8, 1919.

Mr. Wm. Brown, Port Reading Coal Pier.

DEAR SIR: You are authorized to load for account of F. R. Long &  
Co., 2,000 Tons from Pool 34 Boat "Forest Belle."

Credit O. K.

Consigned to Boston &amp; Me R. R.

Mystic Wharf, Boston, Me.

Priority A

11 C.

Per J. B. Herron.

[fol. 64]

No. 962

Tidewater Coal Exchange

November 15, 1919.

Mr. Wm. Brown, Port Reading Coal Pier.

DEAR SIR: You are authorized to load for account of F. R. Long &  
Company 1,100 Tons from Pool 34 Boat Hatteras, consigned to  
Boston & Maine Railroad, Boston, Mass.

Authority by W. T. Lamoure.

O. K.

11-c.

Per J. Brower.

No. 968

Tidewater Coal Exchange

Nov. 15, 1919.

Mr. Wm. Brown.

DEAR SIR: You are authorized to load for account of F. R. Long & Company, 1,100 Tons from Pool 34, Bt. Camden, consigned to Boston & Maine R. R., Boston, Mass.

[fol. 65] Mystic Wharf.

Authority by W. T. Lamoure.

O. K.

11-c.

Per J. Brower.

No. 967

Nov. 15, 1919.

DEAR SIR: You are authorized to load for account of F. R. Long & Company 1,100 Tons from Pool 34, Upton.

J. W. Searles, per T. J. Brower.

Consign to Main Central R. R., Portland, Maine.

Authority by W. T. Lamoure.

11-c.

No. 746

Nov. 25, 1919.

DEAR SIR: You are authorized to load for account of F. R. Long Co., 1,100 Tons from Pool 33-34-44, Bt. Pohatcong.

Consign to Boston & Maine Railroad, Boston, Mass.

[fol. 66] Credit O. K.

Authority of W. T. Lamoure.

11-c.

Per T. J. Brower.

No. 1313

Dec. 12, 1919.

DEAR SIR: You are authorized to load for account of F. R. Long & Co., cargo — Tons from Pool #33-34-35-37-44, bal. 18, Boat "Forest Belle."

Credit O. K.

Consigned to Boston & Me. R. R., Mystic Wharf, Boston, Mass.

Emergency order authority O. W. Stager.

11-C.

## PLAINTIFF'S EXHIBIT 10

## Western Union Telegram

F222 BCAK.  
Boston, Mass.

Nov. 25, 1919.

J. W. Howe, Commissioner Tidewater Coal Exchange, Singer Bldg.,  
New York, N. Y.:

Our wire fourteenth cancel permits Shamokin and Hopatecong and substitute barges Oxford and Upton eleven hundred each load by F. R. Long Co. Port Reading consigned Maine Central Railroad [fol. 67] Portland Me. Classification A No. CX forms here.

W. T. Lamoure.

Nov. 14, 1919.

J. W. Howe, Commissioner Tidewater Coal Exchange, Singer Bldg.,  
New York:

Recommend permits barges Shamokin and Hopatecong both eleven hundred tons loading Port Reading by R. F. Long & Company consigned Maine Central Railroad Portland Maine.

W. T. Lamoure.

Nov. 14, 1919.

J. W. Howe, Commissioner Tidewater Coal Exge., Singer Bldg.,  
New York, N. Y.:

Recommend permits barges Camden and Hatteras 1,100 tons each load Port Reading by F. R. Long and Co. consigned Boston and Maine Railroad Boston Massachusetts barges left Boston today.

W. T. Lamoure.

Nov. 26, 1919.

J. W. Howe, Commissioner Tidewater Coal Exchange, Singer Bldg.,  
New York:

[fol. 68] Recommend permit barges Hopatecong and Strafford 1,100 each load by F. R. Long Company Port Reading consigned Boston and Maine Railroad Boston Mass classification "A" No. CX forms here.

W. T. Lamoure.

J. W. Howe, Commissioner Tidewater Coal Exchange, Singer Building, New York, N. Y.:

Our wire twenty fifth substitute barge Pohatecong for Hopatecong no other change.

W. T. Lamoure.

## PLAINTIFF'S EXHIBIT 11

United States R. R. Administration

Regional Committee

Consecutive No. R 617

Phila., Pa., Nov. 8, 1919.

Mr. Charles H. Ewing, Federal Manager, Phila. & Reading R. R.,  
Phila., Pa.:

Please deliver railroad fuel coal or held commercial coal as follows:  
To B. and M. and Maine Central Barges Request Shickshinny and  
Amplere Railroad.

At (point of interchange) Port Reading.  
[fol. 69] No. of cars: Sufficient to meet requirements.

Size and Grade of Bituminous Coal: Shipped from Harrison, W.  
Va.

Remarks.—Also release sufficient coal at Port Liberty to bunker  
tug boats moving above barges.

(Signed) L. W. Baldwin, Regional Director.

83 Q NE

New York, Nov. 6, 1919.

J. B. Fisher, Phila.:

Requisition #6, please release coal at Port Reading Account F.  
R. Long Co., For B. & M. and Maine Central Barges Request Shick-  
shinny and Amplere. Coal comes from Harrison, W. Va., also please  
release coal at Port Liberty to Bunker Tug Boats to move above  
barges. Advise if this requisition will be honored.

G. N. Snider.

## PLAINTIFF'S EXHIBIT 12

United States Railroad Administration

Director General of Railroads

Allegheny Region

November 1, 1919.

Mr. Elisha Lee, Mr. C. W. Galloway, Mr. C. H. Ewing, Mr. G. L.  
[fol. 70] Peck, Mr. R. N. Gegien, Mr. Ralph Peters, Mr. E. H.  
Utley, Mr. A. M. Darlow, Federal Managers.

GENTLEMEN: I enclose herewith copy of a telegram received from  
the Director General covering instructions to govern the distribution

of coal taken under order of October 31st, and desire to call your attention to several features of these instructions.

Under Item 1 it will be noticed that the Regional Coal Committee will have a representative of the Fuel Administration as one of its members.

Under Item 4 we desire that all the correspondence files, records and other data including the records in the office of the Freight Claim Agent of any claims which may reach him, regarding the distribution of coal, be kept separate from your general files so that in the event it is desired for any purpose to examine the records of any railroad in the matter of this distribution of coal the files may be taken bodily from your records and be complete in themselves.

Under Item 7, it is contemplated that coal will be delivered to [fol. 71] commercial consumers only on specific authority from coal Committee having jurisdiction which, in this case, is the Regional Coal Committee. We can not escape the conviction that there must arise emergency conditions which will require prompt handling, and to cover such conditions Federal Manager may, until further advised, fill emergency requirements which demand immediate attention, and report to the Regional Coal Committee their action and the reasons therefore.

Item 8. The Regional Coal Committee is composed of the following:

Mr. J. B. Fisher, Transportation Assistant, Chairman.

Mr. E. H. Bankard, Chairman, Regional Purchasing Committee.

Mr. W. S. Yeatts, Freight Assistant.

Mr. J. W. Lowery, Asst. Chief Clerk Auditor Frt. Trf. P. R. R.

Mr. Geo. C. Foedisch, Representative, Fuel Administration.

Item 9. Make your report promptly to the Regional Coal Committee, of the representative for your railroad giving both his office, residence telephone number and city exchange through which call should be made.

Item 11. For the present we will not require a report by grand divisions of information as to the coal situation but will ask that in making the report for you railroad you give the location, in a general way, of the coal. For illustration, we would like you to designate the yards, passing sidings or running tracks on which coal may be held.

[fol. 72] On Form A, referred to, for purpose of uniformity, in reporting first two items, A and B, include coal consigned to and for the use of the railroad making the report; Item C, all other coal on the railroad.

In making report show the grades of coal held (if possible show separately low sulphur gas coal), under the following classes: Gas coal, High Volatile, Steam coal, Low Volatile coal, By-Product Coal, separating where possible into run-of-mine, screened and slack.

Your attention is invited to the importance of following instructions in regard to giving this report by the hour named. We should have it in this office not later than 8:00 o'clock a. m.

Item 12. The explanation as to the first three groups applies as in Form A.

Item 13. Form C, is intended for use between the office of the Federal Manager and the Regional Coal Committee, having jurisdiction and will be forwarded for all requests that come to the Federal Manager for coal. Accompanying Form C is supplemental Form of Application and Release, Form CX, which should be used by the applicant when making his application to the Railroad representative, who, we assume, will be the Freight Agent having jurisdiction at the location of the applicant. This supplemental may be made in as many copies as desired and retained by the railroads for its file, and it should be understood that none of these supplemental [fol. 73] forms is to come to this office.

In order to make satisfactory report as called for in the last line of Form C, it is desired that the investigation of the conditions as to coal supply, daily consumption and total requirements of the applicant be personally investigated by a competent and responsible officer of the railroad.

Item 14. In order to avoid duplication of the consecutive numbers to be given each request by the Federal Managers, a letter prefix should be used as follows:

R—Regional Coal Committee.

L—Elisha Lee—Penna. Lines East.

K—G. L. Peck—Penna. Lines West.

G—C. W. Galloway—B. & O. Lines East.

T—Ralph Peters—Long Island.

D—A. M. Darlow—B. & S.

B—R. N. Begien—B. & O. Lines West.

F—C. H. Ewing—P. & R., C. R. R. N. J.

U—E. H. Utley—B. & L. E.

Item 15. The instructions under 15 seem to be sufficiently explicit, but your attention is attracted to them with the request that you establish such safeguards as will insure payment for coal and the legal transportation charges,

Yours truly, (Signed) L. W. Baldwin, Regional Director.

[fol. 74] P. S.—Since dictating the above we have decided to change the make-up of Supplemental Form CX so as to embody the information desired in this office for which Form C was designed, so that the Federal Manager may use Form CX for the double purpose of securing information from the applicant and transmit same to this office all in writing. The Form to be printed on thin paper to secure as many duplicate copies as may be necessary, one legible duplicate copy with the necessary endorsements from the Federal Manager to be sent to this office in lieu of Form C. This will make unnecessary the printing of a separate Form C.

## Copy

## Telegram

Washington, October 31, 1919.

L. W. Baldwin, Regional Director Allegheny Region, Philadelphia, Pa.:

Instructions governing distribution of coal taken under order of October thirty-first, nineteen nineteen.

1. Bituminous coal, including lignite, taken and held in accord-[fol. 75] ance with the instructions of the Director General of October twenty-ninth and thirty-first, nineteen nineteen, or thereafter, will be handled by the Director General and the Regional Director through the agency of a Central Coal Committee at Washington and Regional Coal Committees which will be established jointly by the Regional Directors and the Fuel Administrations. Such regional Coal Committees will comprise the following representatives: One appointed by the United States Fuel Administrator and such others as the Regional Director may select to handle in matters of purchase, distribution and accounting.

2. The bituminous coal held must be distributed only to those concerns who have no reserve supply and must have coal to meet their emergency needs. The following order of preference shall govern the Regional Coal Committee in such distribution as they may make within their jurisdiction for emergency consumption in the United States and Canada:

(a) Railroads.

(b) Army and Navy, together with other departments of the Federal Government.

(c) State and County Departments and Institutions.

(d) Public Utilities.

(e) Retail Dealers.

(f) Manufacturing plants on War Industries.  
Board's Preference List.

[fol. 76] (g) Manufacturing plants not on War Industries.  
Board's Preference List.

(h) Jobbers.

(i) Lake.

(j) Tidewater.

3. Note change in preference list as shown in wire order of October twenty-ninth, nineteen nineteen.

4. When commercial coal is diverted to other than original consignee, promptly notify shipper and original consignee of each car and keep adequate record for later settlement.

5. Originating coal roads should hold a considerable portion of the commercial coal near coal waybilling points, available for prompt distribution.

6. Intermediate and Terminal carriers should, as far as practicable, move commercial coal to, and hold it in the vicinity of, points most convenient for prompt rehandling and distribution.

7. Coal must not be delivered to commercial consumers either in accordance with priority list (established in Rule Two) or otherwise, except with specific authority from the Coal committee having jurisdiction.

8. Regional Directors will immediately notify each railroad under Federal control of the Regional Coal Committee with which it shall deal.

9. Each railroad shall report at once to the Central Coal Committee [fol. 77] and to the Regional Coal Committee the name, title, location and telephone address of the representatives in whom this whole matter will be centered for that railroad.

10. In order that the Central Coal Committee may be informed of the requirements for coal in each region and of the necessity for transferring coal from one region to another, each Regional Coal Committee will make such daily reports to the Central Coal Committee as are provided for herein and may be called for from time to time.

11. Each railroad (or each grand division of a railroad) shall report daily by wire to the Regional Coal Committee, to be received not later than nine a. m. information as to its coal situation for the twenty-four hours ending at one A. M., that day, in accordance with Form A attached herein.

12. Each Regional Coal Committee will report daily by wire to the Central Coal Committee, as promptly as information is available, a summary of the coal situation for the twenty-four hours ending at one a. m. that day in accordance with Form B attached herein.

13. Applications to Regional Coal Committees for delivery of coal to commercial consumers must be made through the Railroad which will make delivery of the coal; such applications must show complete and accurate information with respect to the preferred [fol. 78] nature of the requirements the amount of coal which the applicant has on hand, and the amount which the applicant requires for the preferred use, together with the rate of consumption and the kind and size of the coal desired, all as set forth in Form C attached hereto.

14. Each Regional Coal Committee will apply a consecutive number to all orders authorizing the delivery of coal and compliance with such orders must be reported promptly by the railroad to the Regional Coal Committee.

15. Coal diverted for commercial uses shall be paid for in accordance with the Fuel Administrators' order date- January 14, 1918. In order to insure payments coal shall be diverted for commercial use to such applicants only who shall satisfy the Federal or General Manager of their financial responsibility or who shall deposit a certified check or other satisfactory security in such sum that will insure full payment for any coal furnished. The applicant shall make definite written obligations to pay the shippers for the coal promptly upon presentation of bill. The legal transportation charges, including war taxes, from mines to point of delivery to the applicant, will be collected on delivery in the usual way.

Forms A, B and C mentioned herein attached. Acknowledge receipt by wire.

(S.) Walker D. Hines.

[fol. 79] United States Railroad Administration

Director General of Railroads

— Railroad

Daily Coal Situation Report to Regional Coal Committee, — — —,  
1919

Code letter	Stock situation at 1 a. m.	Number of cars
A	Railroad coal in storage piles, bins, chutes and docks, estimated on basis of 50 tons per car.....	
B	Cars railroad coal at coaling stations and enroute.....	
C	Cars held commercial coal on hand.....	
D	Total coal available for use and distribution.....	
Consumption previous 24 hours ending 1 a. m.		
F	Cars coal used for railroad fuel.....	
G	Cars coal ordered to other railroads.....	
H	Cars coal ordered to Army, Navy and other Govern- ment Departments.....	
J	Cars coal ordered to State and County Departments and Institutions.....	
K	Cars coal ordered to Public Utilities.....	
M	Cars coal ordered to retail dealers.....	
N	Cars coal ordered to manufacturing plants on War Industries Board's preference list.....	
O	Cars coal ordered to manufacturing plants not on War Industries Board's preference list.....	
Q	Cars coal ordered to jobbers.....	
R	Cars coal ordered for lake shipment.....	
S	Cars coal ordered to tidewater.....	
U	Total cars coal disposed of F to S both inclusive.....	

[fol. 80] United States Railroad Administration

## Director General of Railroads

## Regional Coal Committee, — Regions

Code letter	Stock situation at 1 a. m.	Number of cars
A	Railroad coal in storage piles, bins, chutes and docks, estimated on basis of 50 tons per car.....	
B	Cars railroad coal at coaling stations and enroute.....	
C	Cars held commercial coal on hand.....	
D	Total coal available for use and distribution.....	

## Consumption previous 24 hours ending 1 a. m.

F	Cars coal used for railroad fuel.....	
G	Cars coal ordered to other regions.....	
H	Cars coal ordered to Army, Navy and other Govern- ment Departments.....	
J	Cars coal ordered to State and County Departments and Institutions.....	
K	Cars coal ordered to Public Utilities.....	
M	Cars coal ordered to retail dealers.....	
N	Cars coal ordered to manufacturing plants on War In- dustries Board's Preference List.....	
O	Cars coal ordered to manufacturing plants not on War Industries Board's Preference List.....	
Q	Cars coal ordered to Jobbers.....	
R	[fol. 81] Cars coal ordered for Lake Shipments....	
S	Car coal ordered to Tidewater.....	
U	Total cars coal disposed of F to S both inclusive.....	

## United States Railroad Administration

## — Railroad

## Railroad Consecutive No.—

— —, 1919.

Regional Coal Committee at —:

Please authorize delivery of railroad fuel coal or held commercial coal as follows:

To — —, consignee.

At — —, destination.

On — —, delivery railroad.

No. of cars: —.

Size and grade of bituminous coal: —.

By date required: — —, —.

Preference list: —.

Description applicable: —.

Consignee's daily coal consumption: —.

Tonnage of coal in consignee's possession: —.

A written agreement to pay as required by Rule 16 has been secured and satisfactory financial arrangements assured.

[fol. 82] All the above information has been checked and is correct.

(Signed) —, (Title:) —.

## United States Railroad Administration

### Director General of Railroads

#### Application and Agreement for Bituminous Coal

Place, —, Date, — —, —.

To the Director General of Railroads:

Attention of Freight Agent — Railroad, —, Place

Please authorize delivery of railroad fuel coal or held commercial bituminous coal as follows:

To —, Consignee.

At —, Destination, On —, Delivering Railroad.

No. of cars: —. Size & grade of coal: —.

By date required: —, —.

Preference list — description applicable.

Consignee's daily coal consumption: —.

Tonnage of coal in consignee's possession: —.

In consideration of the delivery to the undersigned of coal in cars requested above, the undersigned do hereby agree to pay, upon delivery [fol. 83] mand. for the said coal so delivered to the undersigned in accordance with the order of the U. S. Fuel Administrator as now in effect or hereafter lawfully modified, and the undersigned do further agree to pay to the Director General of Railroads the legally published transportation charges via the route of movement on said coal, including war taxes, from the point or points of origin of said coal to the point or points at which it is delivered to the undersigned, or at which it is delivered in accordance with instructions of the undersigned; and further the undersigned agree to fully indemnify and save harmless the Director General of Railroads and each carrier participating in the transportation of the property herein mentioned from and against any and all claims and demands whatsoever, actions, suits, costs, recoveries, judgments, or executions which may be made, brought, recovered, or levied against the aforesaid Director General of Railroads or against any of the carriers participating, as aforesaid, by reason of the delivery, diversion, re-consignment of reshipment of the property herein as aforesaid to the undersigned or in accordance with the instructions of the undersigned.

(Signature of applicant:) —.

—, Witness.

## Recommendation of Freight Agent

Consecutive No. —

To Regional Coal Committee at — R. R.:

As above in full or to the extent of — per cent.  
Please authorize delivery.

[fol. 84]

Phila. Oct. 29, 1919.

C. W. Galloway, Balto.; F. C. Batchelder, Chgo.; R. N. Begien, Cinti.:

Effective at once please provide sufficient bituminous coal for 30 days normal consumption on each railroad under your jurisdiction, purchasing the required coal if possible at fair prices, but if this can not be done, holding coal in transit up to but not in excess of the quantity necessary to assure 30 days normal supply on each railroad.

Please make a survey of the supply situation on each railroad under your jurisdiction to determine exact conditions and in selecting coal to be held except on the following order of priority shipments which need not be held to insure a 30 days normal supply.

A. Steam railroads inland and coastwise vessels.

B. Domestic including hotels, hospitals and asylums.

C. Navy and Army.

D. Public utilities, including plants and such portion of plants as supply light, heat and water for public use.

E. Producers and manufacturers of food, including refrigeration.

F. National state county and municipal government emergency requirements.

G. Bunkers and other marine emergency requirements not specified above.

[fol. 85] H. Producers of newsprint papers and plants necessary to the printing and publication of daily newspapers.

Coal in transit should not be unloaded in storage nor used until actually needed, so that if its use is later found unnecessary it can be forwarded to destination whenever practicable. Failure to obtain sufficient coal for 30 days normal supply by purchase and holding as above please advise the additional quantity needed for 30 days.

Acknowledge receipt by wire.

L. W. Baldwin.

2.30 a. m.

## PLAINTIFF'S EXHIBIT 13

United States Railroad Administration

Philadelphia, Pa., November 2, 1919.

Mr. Elisha Lee, Mr. G. W. Galloway, Mr. C. H. Ewing, Mr. G. L. Peck, Mr. R. W. Begien, Federal Managers.

[fol. 86] GENTLEMEN: The question has come up as to the activities of various Committees at such places as Philadelphia, Pittsburgh, Cincinnati, Cleveland, etc., and in order to have uniformity the following instructions shall govern until further advised.

In a general way the Committees should be utilized by the Federal Managers as agencies for the investigation of requirements for coal, and their recommendations to you for the fulfillment of such requirements, and the Committees in exercising their activities to aim to co-ordinate the operations at terminal served by more than one railroad, in order that there should be complete harmony of action in supplying various industries under priority list. Likewise at the Tidewater terminals, the Tidewater Coal Exchange representative should be utilized in the same manner for all trans-shipment of coal. The activities of the Committees and the Tidewater Coal Exchange Representatives at Philadelphia and Baltimore will be sub-divided so that the Tidewater Coal Exchange should handle coal trans-shipment matters while the Committees will handle questions pertaining to all-rail deliveries. At Tidewater points where no such complexities exist as at Baltimore and Philadelphia, for illustration South Amboy and Port Reading, the Federal Manager [fol. 87] should utilize the agencies of the Tidewater Coal Exchanges for handling trans-shipment matters.

The jurisdiction of the Philadelphia Committee will be confined to the corporate limits of the City; Baltimore and Pittsburgh the same. The Youngstown Sub-Committee which now acts through the Pittsburgh Operating Committee, should be utilized in this matter of coal distribution as a Sub-Committee of the Pittsburgh Committee, confining its activities to the City of Youngstown. Cincinnati, will come within the jurisdiction of Mr. Worcester, District Director; Chicago under Mr. Aishton, Regional Director; St. Louis under Mr. Bush, Regional Director, New York City and Harbor under Mr. Hardin, Regional Director. Places like Columbus, Cleveland, and Indianapolis it is not thought necessary to establish jurisdiction of a Committee, but Federal Managers should make use of Committees already existing for such investigations and recommendations as they may desire.

Buffalo comes within the jurisdiction of the Eastern Region.

Yours truly, (Signed) L. W. Baldwin, Regional Director.

Copy Mr. E. J. Cleave, Reading Terminal-Philadelphia.

[fol. 88] Please note. Committee of which you are Chairman is the one referred to in this correspondence. Please be prepared to respond to requests made upon you by Federal Managers of railroads entering Philadelphia and make every effort to co-ordinate operations in Philadelphia, so as to secure uniformity of action which is necessary.

Mr. J. W. Howe, Commissioner, Tidewater Coal Exchange, Singer Bldg., New York.

Mr. J. W. Searles, Dept. Com., Tidewater Coal Exchange, Singer Bldg., New York.

Mr. George Patchell, Dept. Co., Tidewater Coal Exchange, Commercial Trust Bldg., Philadelphia.

Mr. G. F. Malone, Dept. Com., Tidewater Coal Exchange, Munsey Building, Baltimore, Md.

Mr. J. J. Mantell, Terminal Manager, Jersey City, N. J.

Mr. O. H. Hobbs, Chairman Baltimore Committee, Baltimore.

Mr. E. A. Peck, Chairman Pittsburgh Committee, Pittsburgh.

[fol. 89]

#### PLAINTIFF'S EXHIBIT 14

(Copy)

#### United States Fuel Administration

Washington, D. C., Nov. 6, 1917.

Order relative to tidewater transshipment of coal at Hampton Roads, Baltimore, Philadelphia, and New York and for the employment of and co-operation with the Tidewater Coal Exchange, so-called, as a common agency to facilitate such transshipment and to reduce delays in the use of coal cars and coal-carrying vessels.

It appearing to the United States Fuel Administrator that the production of coal intended for transshipment at the Tidewater ports of Hampton Roads, Baltimore, Philadelphia and New York, and ports near or usually considered as tributary to said ports is being restricted, and that the loading of coal-carrying vessels and the unloading of coal cars at such ports and the movement, arrival and return of such vessels and cars at and from such ports are congested and delayed, and that the shipment of coal from such ports is reduced in quantity, and that the distribution of coal to consumers in the territory tributary to the ports to which such coal is destined is less efficient, prompt and reasonable than is necessary for the efficient prosecution of the war, and that delay is occasioned in the delivery of coal for vessels of the navy and transports of the army, by reason of the continuance of individual shipments of coal by various producers upon the lines [fol. 90] of coal-carrying roads having terminals at the ports aforesaid, and of individual and distinct transshipments of such coal at

such ports only to coal-carrying vessels especially chartered or designated for the transshipment thereof of such individual shipments, and that the objectionable conditions aforesaid can be largely eliminated and the production, shipment, and distribution of coal from said ports both for the army and navy and for consumers in the territories aforesaid can be hastened and improved by the employment of and co-operation with a common agency at each transshipment port in the manner and with the powers hereinafter provided, and that such employment of and co-operation with a common agency is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the army and navy, and to assure an adequate supply and equitable distribution, and to facilitate the movement, and to prevent locally or generally scarcity, of coal.

The United States Fuel Administrator, acting under the authority of an Executive Order of the President of the United States, dated August 23, 1917, appointing said Administrator, and in furtherance of the purpose of said order and of the Act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that, until further or other order of the United States Fuel Administrator and subject to modification hereafter by him at any time and from time to time, the following rules are established for the regulation, to the extent hereinafter provided, of the method of production, sale, shipment, distribution, apportionment, and storage of bituminous coal for transshipment at the ports aforesaid:

(1) Every shipper of bituminous coal for transshipment at any one of the ports at Hampton Roads, Baltimore, Philadelphia, and New York, and ports near or usually considered as tributary to said ports, shall on and after November 11, 1917, consign all such shipments of coal to the Tidewater Coal Exchange, so-called, of which Rembrandt Peale is the commissioner. Such shipments and consignments shall be made by each such shipper in accordance with and subject to the provisions of the existing Tidewater Coal Exchange rules in the same way, to the same extent, and with the same rights and liabilities respecting such shipments and the transshipment and delivery of the coal included therein, as under the terms of said rules apply to members of said Tidewater Coal Exchange, but no such shipper subject to this order shall be required by reason of anything herein to become a member of said Tidewater Coal Exchange. A copy of said rules is annexed to this order and hereby referred to. Wherever said rules refer, or mention a "member" or "members" of said Tidewater Coal Exchange, said terms shall with respect to this order and shippers subject hereto be deemed to mean a shipper or shippers of coal who are subject to this order; and wherever the "effective date" of the Exchange or of said rules is referred to therein, such reference shall be deemed, with respect [fol. 92] hereto and to the shippers subject hereto, to refer to the effective date of this order.

(2) Bituminous coal consigned under the provisions of this order shall be graded and classified in accordance with "Exhibit B Consigning Pool Numbers," referred to in said rules of the Tidewater Coal Exchange, as modified, cancelled or superseded by the provisions of Classification C, dated July 15, 1917; Classification D, dated July 17, 1917; Classification E, dated July 19, 1917 and Classification F, dated July 27, 1917, and in accordance with the provisions of said Classifications C to F inclusive, wherever applicable, copies of which and of said "Exhibit B" are on file with this order in the office of the United States Fuel Administrator for inspection by any shipper subject hereto. Changes in said Classification shall not be made against the objection of any shipper subject hereto, except after approval of such changes by the United States Fuel Administrator. Upon application from any shipper subject hereto, the representative of the United States Fuel Administrator appointed under the provision of paragraph (3) of this order is directed to furnish copies of said "Exhibit B," and said Classifications C to F to such shipper.

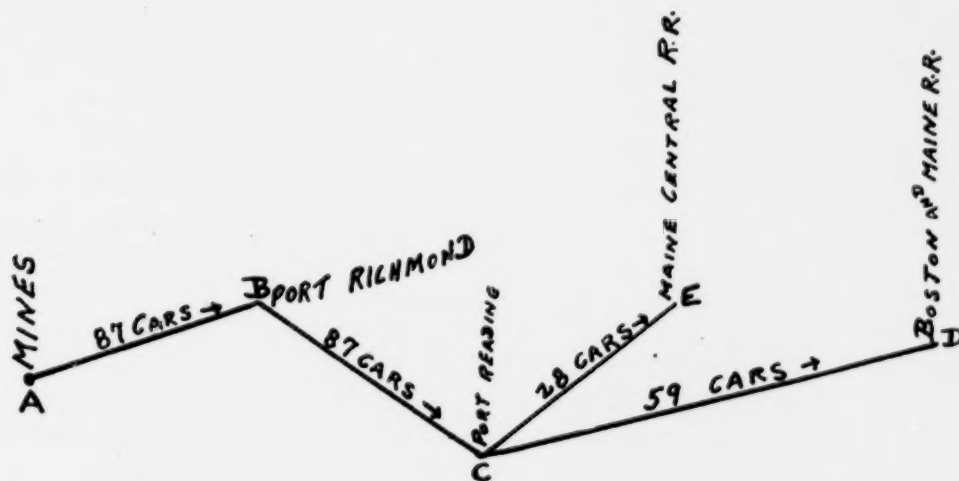
(3) Said Rembrandt Peale, commissioner of said Tidewater Exchange, is hereby designated and appointed as the representative of the Fuel Administrator to carry out the provisions of this order, with [fol. 93] power to appoint deputies representing him as such representative of the United States Fuel Administrator at any one or all of the ports aforesaid; and in case of any disagreement or controversy between any shipper subject to the provisions hereof and said commissioner with respect to any shipment or trans-shipment of coal or other matter arising under this order, or if any decision under rule No. 15 of the said Tidewater Coal Exchange Rules hereto annexed, which would be final as to any member of said Exchange, is unsatisfactory to any shipper subject to the provisions hereof, such shipper may appeal to the United States Fuel Administrator.

(4) No change shall be made in said rules to the Tidewater Coal Exchange above referred to, a copy of which is annexed to this order, and no additional rules shall be adopted affecting shippers subject to this order, without first receiving the approval of the United States Fuel Administrator.

(5) No change shall be made in the membership of the Executive Committee of said Tidewater Exchange, except with the approval of the United States Fuel Administrator so long as this order is in effect.

(6) Any shipper subject to the provisions of this order may at any time apply to the United States Fuel Administrator for suspension or termination of this order upon the ground that its continuance is no longer essential to the national security and defense and for the successful prosecution of the war in which the United States is at present engaged.

ARCHIBALD MCNEIL AND SONS CO. INC. VS. U. S. A.



DEPT Ex. 1  
11/28/23

95

EIGHTY SEVEN CARS OF COAL SHIPPED FROM MINES (A) BY JAMISON COAL AND COKE CO. TO THEIR ACCOUNT IN TIDEWATER COAL EXCHANGE AT (B) PORT RICHMOND (PHILADELPHIA). ON ARRIVAL AT (B) ON ACCOUNT OF CONGESTION, THE COAL WAS RECONSIGNEED BY BITUMINOUS COAL DISTRIBUTION COMMITTEE, AT THE REQUEST OF TIDEWATER COAL EXCHANGE, TO SAME CONSIGNEE AT (C) PORT READING, N. J. SUBSEQUENT TO ARRIVAL AT (C) THE COAL WAS DUMPED BY PORT READING RAILROAD, FOR ACCOUNT OF F. R. LONG & CO., BY ORDERS OF THE TIDEWATER COAL EXCHANGE, AND UPON AUTHORITY GRANTED BY W. T. LAMOURE, CHAIRMAN, NEW ENGLAND DISTRICT COAL COMMITTEE, THE EXCHANGE ORDERED THE COAL DUMPED FOR LONG'S ACCOUNT INTO VESSELS CONSIGNEED TO (D) BOSTON & MAINE RAILROAD, 59 CARS, AND TO (E) MAINE CENTRAL RAILROAD, 28 CARS.

[fol. 94] (7) A copy hereof shall be served upon each of the railroad or railway companies and upon each of the producers of bituminous coal named in the list marked "Exhibit 1 to the Tidewater Coal Exchange Transshipment Order of The United States Fuel Administrator, dated November 6th, 1917."

H. A. Garfield, United States Fuel Administrator.

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(Here follows Defendant's Exhibit No. 1, marked side folio page 95)

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[fol. 96] DEFENDANT'S EXHIBIT 1-A

(Copy)

United States Railroad Administration

Director General of Railroads

Application and Agreement for the Delivery of Bituminous Coal

Place, Boston, Date, Dec. 16, 1919.

To the Director General of Railroads:

Attention of Freight Agent P. & R. Railroad, Port Reading Place

Please authorize delivery of bituminous coal as follows:

To Boston & Maine Railroad, —, applicant.

At Boston, destination, on B. & M., delivering railroad.

No. of cars: —. Size and grade of coal: 1,820 tons R-M in barge Forest Belle.

By date required: 12-16-19.

Preference list description applicable: A.

Applicant's daily coal consumption: Approx. 5,000 tons. Tonnage of coal in Applicant's possession: 140,000 tons.

In consideration of the delivery to the undersigned of coal in cars requested above the undersigned do hereby agree to pay, upon demand, for the said coal so delivered to the undersigned in accordance with the order of the U. S. Fuel Administrator as now in [fol. 97] effect, or hereafter lawfully modified, and the undersigned do further agree to pay to the Director General of Railroads the legally published transportation charges via the route of movement of said coal, including war taxes, from the point or points of origin of said coal to the point or points at which it is delivered to the undersigned, or at which it is delivered in accordance with instructions of the undersigned; and further the undersigned agree to fully indemnify and save harmless the Director General of Railroads and each carrier participating in the transportation of the property herein mentioned from and against any and all claims and demands

whatsoever, actions, suits, costs, recoveries, judgments, or executions which may be made, brought, recovered, or levied against the aforesaid Director General of Railroads or against any of the carriers participating, as aforesaid, by reason of the delivery, diversion, reconsignment or reshipment of the property herein as aforesaid to the undersigned or in accordance with the instructions of the undersigned.

(Signature of applicant:) J. R. Rooks, Fuel Agent.

S. J. Trudian, Witness.

Approved: J. W. Howe, Commissioner.

[fol. 98]

D'F'T's EXHIBIT 1-B

United States Railroad Administration

Philadelphia and Reading Railroad, Atlantic City Railroad, Port Reading R. R.

Telegram—Phila., November 10, 1919. Mailgram

O. H. Hagerman, Port Richmond:

Confirming 'phone order. Reconsign two hundred (200) cars pools 33 and 34 bituminous coal Port Richmond Piers to same consignment Port Reading Piers. Also fifty (50) cars pool 37 bituminous coal to same consignment Port Reading, N. J. with all charges following, and issue letter of transfer.

O. W. Stager.

Form C. K. R. E. E. #3.

Mr. P. J. Kelly, Bldg., c-o Mr. Foote.

Mr. E. B. Crosley, Bldg., on request of Tidewater Coal Exchange, Phila.

D'F'T's EXHIBIT 1-C

Western Union Telegram

[fol. 99] HM. Boston, Mass., 1249 P.

1919, No. 26, P. M. 12.59.

J. W. Howe, Commissioner, Tidewater Coal Exchange, Singer Building, New York, N. Y.:

Our wire twenty fifty substitute barge Pohatecong for Hopatcong no other change.

W. T. Lamoure.

Boston and Maine.

OK. J. W. Howe.

em 11-28.

Order #746. 11-26.

## D'F'T's EXHIBIT 1-D

## Western Union Telegram

HM. Boston 505 P. 25.

1919, Nov. 25, P. M. 5.17.

J. W. Howe, Commissioner, Tidewater Coal Exchange, Singer Bldg.,  
New York, N. Y.:

Recommend permit barges Hopatcong and Strafford 1,100 each  
load by F. R. Long Company Port Reading consigned Boston and  
Maine Railroad Boston Mass. Classification "A" no CX. forms here.  
W. T. Lamoure.

OK. J. W. Howe.

em 11-26.

Order #747 11-26.

## D'F'T's EXHIBIT 1-E

## Western Union Telegram

[fol. 100] HM. Boston, Mass., 545 P. 14 (1681).

1919, Nov. 14, P. M. 6.05.

E. 449B. CAK.

J. W. Howe, Commissioner, Tidewater Coal Exchange, Singer Bldg.,  
New York, N. Y.:

Recommend permits barges Upton Shamokin and Oxford Hopat-  
cong both eleven hundred tons loading Port Reading by F. R. Long  
& Company consigned Maine Central Railroad Portland, Maine.

W. T. Lamoure.

Order No. 966. Order #967.

em 11-28.

## D'F'T's EXHIBIT 1-F

## Western Union Telegram

B385B. CAK.  
Boston, Mass., 14.

1919, Nov. 14, P. M. 5.12.

J. W. Howe, Commissioner, Tidewater Coal Exge., Singer Building,  
New York, N. Y.:

Recommend permits barges Camden and Hatteras 1,100 tons each  
load Port Reading by F. R. Long and Co. consigned Boston and  
Maine Railroad Boston Massachusetts barges left Boston today.

W. T. Lamoure.

#968. Order #962.

[fol. 101]

## D'F'T's EXHIBIT 1-G

## Telegram

The Pennsylvania Railroad Company

New York, Philadelphia & Norfolk Railroad Company, West  
Jersey & Seashore Railroad Company

17-18 PC. H. E.

Phila., Dec. 12, 1919.

J. W. Howe, New York:

Regional Coal Committee advises as follows: "Central Coal Committee Washington authorizes loading two barges Port Reading, Eastern Region railroads outside of New England. Arrange according and advise CX form forwarded in customary manner referring file C-C-6-1024." Arrange to have forwarded promptly file X-1.  
C. W. Stager.

5.56. p.

Shenango, Maine Central, Forest Belle, Boston & Maine, B. & Me.,  
Central.

These CX should be sent direct to W. T. L.

## D'F'T's EXHIBIT 1-H

## Form C

United States Railroad Administration

Director General of Railroads

Regional Committee

Philadelphia, Pa., Nov. 8, 1919.

Mr. Charles H. Ewing, Federal Manager Phila. & Reading R. R.,  
Philadelphia, Pa.:

[fol. 102]

Consecutive No. R. 617

Please deliver railroad fuel coal or held commercial coal as follows:

To B. and M. and Maine Central Railroad barges.

Request Shickshinny and Amplere.

At (point of interchange) Port Reading.

No. of cars: Sufficient to meet requirements.

Size and grade of bituminous coal: Shipped from Harrison, W. Va.

By date required: — —, — —.

Remarks.—Also release sufficient coal at Port Liberty to bunker  
tug boats moving above barges.

(Signed) L. W. Baldwin, Regional Director. em.

## D'F'T'S EXHIBIT 1-I

## Executive Order

Whereas the United States Fuel Administrator acting under the authority of an Executive Order issued by me dated the 23rd of August, 1917, appointing the said Fuel Administrator and of subsequent Executive Orders, and in furtherance of the purpose of said orders and of the Act of Congress, therein referred to and approved August 10, 1917, did, on January 31, 1919, and on February 20, 1919, execute and issue orders suspending, until further order by the President certain rules, regulations, orders and proclamations theretofore promulgated relating to the fixing of prices, the production, sale, shipment, distribution, apportionment, storage and use of coal, [fol. 103] and whereas it is necessary to restore *the* maintain during the war certain of said rules, regulations, orders and proclamations:

Now, Therefore, I, Woodrow Wilson, President of the United States of America, acting under authority of the aforesaid Act of Congress, approved August 10, 1917, do hereby revoke and annul said orders of January 31, 1919, and February 20, 1919, to the extent necessary to restore all of the said rules, regulations, orders and proclamations therein suspended concerning:

- (a) Fixing prices of bituminous and lignite coal at the mines:
- (b) Fixing or regulating commissions of persons and agencies performing the functions of middlemen dealing in bituminous and lignite coal:
- (c) Fixing or regulating gross margins or prices of wholesale and retail dealers in bituminous and lignite coal:

and do hereby restore all of said rules, regulations and proclamations, to the extent herein provided, to full force and effect, as if they had not been suspended.

Inasmuch as it is contemplated that it may be necessary from time to time to revoke other portions of said orders of January 31, 1919, and February 20, 1919, and to restore to full force and effect rules, regulations, orders and proclamations, or portions thereof, regulating the production, sale, shipment, distribution, apportionment, storage or use of bituminous and lignite coal, the Fuel Administrator shall, [fol. 104] as occasion arises, restore, change or make such rules or regulations relating to the production, sale, shipment, distribution, apportionment, storage or use of bituminous and lignite coal as in his judgment may be necessary.

Woodrow Wilson.

The White House, October 30, 1919.

## D'F'T's EXHIBIT 1-J

Washington, D. C., October 31, 1919.

Acting under authority conferred upon me by the President of the United States under and by virtue of authority conferred upon him by the Act of Congress approved August 10th, 1917, I hereby revoke the order of the United States Fuel Administrator issued January 31, 1919, in so far as it suspended the order of the United States Fuel Administrator of January 14th, 1918, effective seven o'clock a. m., January 15, 1918, and the portion of the order of the United States Fuel Administrator of May 25, 1918, setting up Preference lists, and I hereby restore the said order of January 14, 1918, and said portion of the order of May 25, 1918, to like effect as if they had not been suspended; and I designate the Director General of Railroads and his representatives to carry into effect the said order of January 14, 1918, and to make such diversions of coal which the railroads under his direction may as common carriers have in their possession, as may be necessary in the present emergency to provide for the requirements of the country in the order of priority set out in the preference list included in the order of the United States Fuel [fol. 105] Administrator of May 25, 1918, as follows:

- (a) Railroads.
- (b) Army and Navy, together with other Departments of the Federal Government.
- (c) State and County Departments and Institutions.
- (d) Public Utilities.
- (e) Retail Dealers.
- (f) Manufacturing Plants on War Industries Board's Preference List.
- (g) Manufacturing Plants not on War Industries Board's Preference List.
- (h) Jobbers.
- (i) Lake.
- (j) Tidewater.

This order to be effective at once.

H. A. Garfield, United States Fuel Administrator.

---

D'F'T's EXHIBIT 1-K

Order of January 14, 1918

Washington, D. C.

All shipments of coal, whether f. o. b. mines or otherwise, and all shipments of coke f. o. b. ovens or at place of storage or otherwise

shall be made subject to the diversion of such coal or coke by the United States Fuel Administrator or any persons acting under his authority, to any persons or consumers, and for any of the pur- [fol. 106] poses heretofore or hereafter authorized by him. The title of the purchaser, consignee, or consumer, in the case of any such shipments of coal or coke, which by custom or law might become vested at the time and place of such shipment, shall from and after the effective date hereof be subject to the condition that the coal or coke so shipped may be diverted as aforesaid, and that in case of any such diversion the title and interest of such purchaser, consignee, or consumer with respect to any coal or coke so diverted shall be completely divested and terminated and his liability to pay therefor shall cease. The person or consumer to whom any such coal or coke is diverted shall become liable as of the time of such diversion to pay to the shipper thereof the price in force at the date of shipment as fixed therefor by or under authority of the President of the United States, plus transportation charges thereon and plus a handling charge of 15 cents a net ton to cover costs of rebilling, collection, and replacement. If such handling charge is made, no jobber's commission shall be added to the mine's price. If the coal or coke so diverted was shipped under a valid and enforceable contract, the quantity thereof so diverted shall not be charged against the amount to which the contract applied.

H. A. Garfield, United States Fuel Administrator.

Effective at 7 a. m., on January 15, 1918.

[fol. 107]

#### D'F'T's EXHIBIT 1-L

Order of the United States Fuel Administrator of Nov. 20, 1918, effective Nov. 21, 1918, vacating the order of Jan. 14, 1918, relative to the basis of settlement for diverted coal so far as said order authorizes a rehandling charge of fifteen cents per ton.

Washington, D. C., Nov. 20, 1918.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated 23 August, 1917, appointing said Administrator, and of subsequent Executive Orders, and in furtherance of the purpose of said orders and of the act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that the order of said Administrator dated January 14, 1918, entitled "Regulation established by the President of the United States, acting through the undersigned Fuel Administrator relative to the sale, shipment, distribution, and apportionment of coal and coke among dealers and consumers and the price to be paid therefor in case of diversion," be, and the same hereby is, vacated and set aside as of the effective date of this order,

so far as said order authorizes a handling charge of 15 cents per ton, to cover costs of rebilling, collection, and replacement, to be added to the price of coal or coke diverted by the United States Fuel Administrator, or by any person acting under his authority. Except as hereinabove provided said order shall remain in full force and effect.

[fol. 108] This order to be effective November 21, 1918.

H. A. Garfield, United States Fuel Administrator.

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D'F'T's Ex. 1-M

Washington, D. C., November 12, 1919.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, Dated 23 August, 1917, appointing said Administrator, and of subsequent Executive Orders, and in furtherance of the purpose of said Order and of the Act of Congress therein referred to and approved August 10, 1917.

Hereby orders and directs that the Executive Order dated October 30, 1919, restoring certain rules, regulations, orders and proclamations relative to prices of bituminous coal and lignite, and the margins and profits of middle men and wholesale and retail dealers in bituminous coal and lignite, shall not be applicable to bituminous coal shipped on or after November 13, 1919, under a bona fide contract enforceable at law, entered into prior to October 30, 1919, and coal shipped under any such contract and diverted in transit, shall be paid for by the party receiving the same, at the price at which the shipper would be entitled to bill the same to the original consignee thereof.

The regulation of said Administrator dated January 17, 1919, entitled "Regulation relative to the Making of Contracts for the Sale of Coal or Coke by Operators, Jobbers, Sales Agents or Purchasing Agents of Coal or Coke," and the order of said Administrator dated January 14, 1918, relative to the price to be paid for coal by the divertee in case of diversion, as amended by the order of said Administrator dated November 20, 1918, and each of them is, hereby suspended in so far as said regulation and order, or either of them, are inconsistent with this order.

H. A. Garfield, United States Fuel Administrator, by Cyrus Garesey, Jr., Assistant United States Fuel Administrator.

## D'F'T's EXHIBIT 1-N

Amended Order of the United States Fuel Administrator of Feb. 25, 1918, Fixing Prices for Export and Bunker Coal Issued in Publication No. 15 (Revised) of the United States Fuel Administration.

Washington, D. C., February 25, 1918.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States dated 23 August, 1917, appointing said administrator, and in furtherance of the purpose of said order and of the act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that the order of the United States Fuel Administrator dated December 13, 1917, and entitled "Relative to prices for coal for foreign bunkering purposes and export [fol. 110] cargoes," is hereby amended to read as follows:

1. Until further or other order of the United States Fuel Administrator, the maximum price of coal sold and delivered for export to foreign countries, excepting Canada and Mexico, or to vessels for foreign bunkering purposes, shall be the price prescribed for such coal at the mine at the time such coal left the mine, plus transportation charges from the mine to port of loading, plus \$1.35 per ton of 2,000 pounds. To this price, computed as above, the seller of the coal, or such other agency as performs the actual work of bunkering or loading the vessel, may add the customary and proper charges, if any, for storage, towing, elevation, trimming, special unloading, and other port charges, and is subject to all present and future regulations of the United States Government.

2. No coal can be invoiced at the excess price provided in this order except by the operator or dealer who actually loads it into foreign vessels and only after the coal has been so loaded.

3. After, and only after, such excess price has been collected in accordance with paragraph 2, all or such part of it as has been agreed upon beforehand may be paid to the dealer or dealers from or through whom the coal was obtained.

4. In settling the price of coal for foreign bunkering or export purposes, no jobber's margin or other commission in addition to the \$1.35 per ton provided in the order shall be added to the price of the coal.

[fol. 111] 5. The phrase "delivered—to vessels for foreign bunkering purposes" mentioned above, is hereby held to mean coal put in the bunkers of any vessel sailing from a tidewater port for any port outside the United States and Alaska, excepting naval vessels or Army transports.

6. Coal shipped to possessions or dependencies of the United States, when consigned to any department of the United States Government, shall not take the excess price provided by this order.

H. A. Garfield, United States Fuel Administrator.

[Title omitted]

Sur Trial Hearing Before the Court Without a Jury—Filed  
Jan. 14, 1924

## OPINION

DICKINSON, J.:

There are no evidentiary fact findings to be made, all the facts having been stipulated, or if not, being not now in controversy.

There are but two questions of law presented, and as one has already been ruled, there is but one remaining question. This question is whether there was a taking of the property of the plaintiff by the United States within the meaning of the Constitutional provision that there shall no "private property be taken for public use without just compensation."

In order that the real question may be fairly faced several general observations may well be made. One is that independently of the Constitutional provision private property might be taken for public use without compensation through the exercise of the power of eminent domain. Another is that had the coal which figures in this case been taken for the direct use of any Department of the [fol. 113] Government of the United States the right of plaintiff to judgment would be admitted. Still another is that as a war measure the United States, through its Director General of Railroads, took over the administration of railroads, and through its Fuel Administrator the direction and control of the coal supply of the Country. And still another is that at the time to which the statement of claim in this case refers the Fuel Administrator was without the personnel of an organization, and for the purposes of this and other like cases was loaned the organization of the Director of Railroads for fuel administration service.

The formulation of any statement or indeed any list even of all the provisions of the law and of the regulations in chronological or logical sequence which would be full and adequate would call for an expenditure of labor and space which is denied to the limits of an opinion.

The industry and disposition of counsel to meet the questions presented in this cause fairly and squarely has relieved us of this duty. We see no need for the Court to do more than rule upon the broad questions of law presented because when these are ruled the judgment which results is a logical consequence over which counsel will not differ. We accordingly content ourselves with a statement of the broad findings made, with leave to the parties to submit requests for other or more specific findings, if either wishes to do so, the answers to which will be incorporated with this opinion. These findings are of a mixed nature and will be designated simply as findings without any attempt to distinguish between findings of fact and conclusions of law.

[fol. 114]

## Discussion

We have what has been aptly characterized as a fighting Constitution. This means that the war power is the dominant one of those conferred and when in exercise commands the yielding to it of all others. This is not because of any scheme of distribution of powers or because of the will or consent in any real sense of any one but because of the law of necessity. This further, however, does not mean that other provisions of the Constitution are ignored, nullified or suspended by the calling of the war power into exercise. It simply means that the war power must be left untrammelled. The war power of a nation is nothing more than the forces possessed by its people organized for public defense. Among these possessions are the manhood of the nation and the property of its people. Wealth or property has power, as in a like sense, knowledge is power. The Government may take for public purposes both the manhood and the wealth of the nation. When the man power is appropriated, there is no compensation allowed for the sacrifice made than such as a gratified nation may award. This may take the form of bounty, pay, pension or bonus, as Congress may will. There is no thought in any of these gratuities of what we call a legal right. When, however, property is taken the owner has a legal right to "just compensation". There can of course be no lawful taking except for a public use, but aside from this the legal right to compensation arises not out of the mode nor the manner of the taking nor the purpose for which taken but out of the taking. In other words, the "compensation" to which the owner has this legal right becomes due to him because he has lost his property by reason of its appropriation to a public use. This is the basis of the plaintiff's claim.

[fol. 115] The position of the defence is, as we understand it, that had this coal been taken or "requisitioned" (as the phrase is) and been devoted to the use of the army or navy, the right of the plaintiff to compensation would not be disputed, but inasmuch as it was taken by subordinates of the Director of Railroads, acting at the time as subordinates of the Fuel Administrator and by authority of his order for the use of a concern known as Long & Company for the purpose of being sold by them to a railroad company to be used for railroad purposes, the coal, although thus taken, was not "taken" but was merely "diverted". There would be small comfort to the owner of property, whose property had been taken from him and he thus deprived of it, to receive the assurance that it had not been "taken" but "diverted". Any such owner would be slow to understand why he lost his right to compensation for property which had been taken from him because the one who had taken it changed his name from "taker" to "diverter". A well known educator and writer has expressed the lesson of his experience, diplomatic and otherwise, that "words are slippery and thought are viscous". The word "taken" in Constitutional use has, in the revision of State Constitutions, been amplified into the phrase "taken, injured or destroyed". The immediate occasion for such change in the Constitution of Pennsylvania was that the Courts of that State had held that

an owner of property, whose property had not in fact been taken, could not recover compensation because it had been subjected to a consequential injury through a public improvement. Here there is a difference not merely in verbiage but in our concept of what the words bring before our minds. Property may be taken without being injured or it may be injured without being taken, but it is impossible to get a concept of this property being diverted in the sense [fol. 116] in which the word is here used unless it had been first taken. A thought which can readily be grasped and which is doubtless the true one, is that the word "diversion" relates not to the act of taking but to the purpose for which taken.

The question before us then becomes this that if the United States takes private property for the ultimate purpose of some one else, has the owner the right to compensation? The property cannot be lawfully taken except for a public use, and we are unable to see that the owner has any concern in what that use is.

The position of the defendant really is one not of denial of the plaintiff's claim but of the remedy which is being pursued. Whatever the legal right the sovereign cannot be sued except as it consents. Upon this phase of the case we have already passed, and plaintiff has the right of adherence to this ruling. Either party has leave to move for judgment in accordance with this opinion and the stipulation into which the parties have entered, and jurisdiction is retained for this purpose, and likewise for the purpose of incorporating herewith the answers to any requests for findings of fact or conclusions of law which may be presented.

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[fol. 117] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT

And now, this 25th day of February, 1924, on motion of Charles H. Burr, Esq., attorney for plaintiff, the Court enters judgment for plaintiff under the findings of fact and law heretofore filed herein in the sum of \$17,041.75, together with interest thereon amounting to the sum of \$4,330.36; that is to say, a judgment in the total sum of \$21,372.11 with costs.

By the Court.

(Sgd.) Dickinson, District Judge.

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[fol. 118] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed May 7,  
1924

And now comes the United States of America, defendant herein, by George W. Coles, United States Attorney, and says:

That on the 25th day of February, 1924, the District Court entered a judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

Wherefore this defendant prays that a Writ of Error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

George W. Coles, United States Attorney, for Defendant.

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[fol. 119]

[Title omitted]

And now, this 7th day of May 1924, comes the defendant by its attorney and files herein and presents to the court its petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof of the court does allow the writ of error prayed for.

By the Court.

Dickinson, U. S. District Judge.

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[fol. 120]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 7, 1924

The defendant in this action in connection with its petition for writ of error makes the following assignment of errors, which it avers exist:

First. The Court erred in denying defendant's motion to dismiss for want of jurisdiction;

Second. The Court erred in conceiving that the plaintiff had a cause of action against the defendant under the Fifth Amendment to the Constitution of the United States, and under Section 10 of the Act of Congress approved April 10, 1917, 40 Stat. 276, commonly known as the Lever Act.

Third. The Court erred in entering judgment in favor of the plaintiff and against the defendant.

Wherefore the plaintiff prays that the judgment of the said District Court be reversed.

George W. Coles, United States Attorney, for Defendant.

[fol. 121] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGES' CERTIFICATE—Filed May 7, 1924

In this cause I hereby certify that the order denying the motion to dismiss herein was based on ground that this Court had jurisdiction of the parties in the cause of action herein; and that the judgment was entered in this case in favor of the plaintiff and against the defendant on the ground that the plaintiff had a right of action against the defendant within the meaning of the Fifth Amendment to the Constitution of the United States that there shall no "private property be taken for public use without just compensation."

This certificate is made conformably to Act of Congress of March 3, 1891, Chapter 517, and the opinion filed herein is made part of the record and will be certified and sent up as a part of the proceedings, together with this certificate.

This 7th day of May, 1924.

O. B. Dickinson, District Judge.

[fol. 122] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRECIPUE FOR TRANSCRIPT OF RECORD—Filed May 26, 1924

To the Clerk U. S. District Court, Eastern District of Pennsylvania:

In preparing the record in the above case, please include the following:

1. Docket Entries,
2. Writ of Error,
3. Plaintiff's Statement of Claim,
4. Special Appearance for Defendant,
5. Motion to Dismiss,
6. Opinion, Dickinson, Judge, Sur Motion to Dismiss,

7. Defendant's Exception to Refusal of Motion to Dismiss,
8. Affidavit of Defense Regarding Questions of Law,
9. Supplemental Affidavit of Defense Raising Questions of Law,
10. Opinion Dickinson Judge, Sur Affidavit of Defense Raising Questions of Law,
11. Affidavit of Defense,
12. Stipulation Waiving Jury Trial,
13. Testimony,
14. Opinion Dickinson Judge Sur Trial Hearing before the Court without a jury,
15. Judgment for Plaintiff,
16. Petition for Writ of Error and Order Thereon,
17. Assignment of Errors,
18. Certificate of Jurisdictional Question Involved,

and no others.

George W. Coles, U. S. Attorney.

5/26/24.

[fol. 123] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, George Brodbeck, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings, in the case of Archibald McNeil & Sons Company, Inc., vs. United States of America, No. 9792 September Sessions, 1922, as per *præcipe* filed, a copy of which is hereto attached, the transcript of record in the above entitled cause is to include, now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 2nd day of June, in the year of our Lord one thousand nine hundred and twenty-four, and in the one hundred and forty-eighth year of the Independence of the United States.

George Brodbeck, Clerk. (Seal of the District Court of the United States, E. D. Penna.)

Endorsed on cover: File No. 30,409. E. Pennsylvania D. C. U. S. Term No. 444. The United States of America, plaintiff in error, vs. The Archibald McNeil & Sons Co., Inc. Filed June 12th, 1924. File No. 30,409.

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# In the Supreme Court of the United States

OCTOBER TERM, 1924

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UNITED STATES OF AMERICA, PLAINTIFF IN	} No. 444
error	
v.	
THE ARCHIBALD McNEIL & SONS Co., INC.	

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*IN ERROR TO THE DISTRICT COURT OF THE UNITED  
STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA*

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## BRIEF FOR THE UNITED STATES

### STATEMENT

At the suit of The Archibald McNeil & Sons Company, the District Court for the Eastern District of Pennsylvania rendered a judgment against the United States for \$17,041.75, together with interest amounting to \$4,330.36, a total of \$21,372.11, and this writ of error brings up that judgment for review. The contention of the United States is that the court below was without jurisdiction to render the judgment, and that is the sole question presented. The District Judge made a certificate (p. 62) pursuant to the Act of Congress which is now Section 238 of the Judicial Code.

The plaintiff sought to recover for coal used by the Director General of Railroads in the operation of the Boston & Maine and Maine Central railroads during the period of Federal control, and the contention of the United States is that such action was maintainable only against the Director General of Railroads, or, after he ceased to operate the railroads, against the Agent of the President.

#### THE FACTS

From the Statement of Claim it appears that The Archibald McNeil & Sons Company was a Connecticut corporation, and it is alleged that jurisdiction of the action arises under the Fifth Amendment to the Constitution of the United States and under the Tenth Section of the Act of August 10, 1917, Chap. 53, 40 Stat. 276, commonly called the Lever Act; that by virtue of the authority conferred by that Act the President, acting by and through the Fuel Administrator, commandeered and requisitioned certain coal owned by the plaintiff (p. 3) and that the coal was used in the operation of the Boston & Maine and Maine Central railroads (p. 4). It was alleged that the fair and reasonable value and true market price of the coal was not less than the amount fixed by the Fuel Administrator for New River coal for export, to wit, \$4.536 per ton, amounting in all to \$17,422.32, which is substantially the amount for which judgment was rendered. It is averred

that the plaintiff is entitled to just compensation and that it "has made for the space of three years every effort to collect the value of the said coal so commandeered and requisitioned, and that no part of said sum has been paid by or on behalf of defendant to plaintiff" (p. 5). It is nowhere alleged that the President ascertained or attempted to pay just compensation for the coal or that any of the procedure provided by Section 10 of the Lever Act was ever followed.

The United States filed a motion to dismiss on the ground that the plaintiff was a Connecticut corporation and a citizen and resident of that State, and that by reason thereof the action had been brought in the wrong district (p. 6). The court denied that motion in an opinion appearing at pages 6 to 8, holding that under the Lever Act the right to bring an action against the United States was not limited to any district, whereas under the Tucker Act action could be brought only in the district of the plaintiff. To this ruling the United States excepted (p. 8).

Thereupon the United States filed an affidavit and supplemental affidavit of defense raising questions of law (pp. 9, 10). These affidavits raised the points that the statement of claim failed to set up a cause of action against the United States cognizable in the District Court for the Eastern District of Pennsylvania; that the complaint set forth a diversion of coal under the provisions of

Section 25 of the Lever Act, instead of a requisition under Section 10 of the Act, and that plaintiff's remedy, if any, was by a suit against the Agent designated by the President under Section 206(a) of the Transportation Act. These points were overruled in an opinion set forth at pages 10 to 15.

Thereupon an affidavit of defense was filed (p. 16) averring that no action was taken by the United States against the plaintiff under Section 10 of the Lever Act; that the coal was purchased under contract from F. R. Long & Co. by the Boston & Maine and Maine Central railroads while under Federal control and used by them for their general transportation purposes, and that the coal was never commandeered or requisitioned by the President under Section 10 of the Lever Act. The case then went to trial, a jury being waived by stipulation in writing (p. 17), and resulted in the judgment now under review. The evidence consisted very largely of telegrams and other documents, and the court filed a written opinion (pp. 58-60).

In view of the single contention now made it is sufficient to say that there was and is now no dispute between the parties as to the relevant facts, which, to state them in the language of Judge Dickinson in his decision, are—

that as a war measure the United States, through its Director General of Railroads,

took over the administration of railroads, and through its Fuel Administrator the direction and control of the coal supply of the country. And still another is that at the time to which the statement of claim in this case refers the Fuel Administrator was without the personnel of an organization, and for the purposes of this and other like cases was loaned the organization of the Director of Railroads for fuel administration service (p. 58).

What was actually done with the coal is shown by Defendant's Exhibit 1, page 48. It was shipped from the mines by Jamison Coal & Coke Company to their account in the Tidewater Coal Exchange at Port Richmond. On arrival at Port Richmond, on account of congestion the coal was reconsigned by the Bituminous Coal Distribution Committee, at the request of the Tidewater Coal Exchange, to the same consignee at Port Reading, New Jersey. After it reached Port Reading it was dumped by the Port Reading Railroad for account of F. R. Long & Co. by orders of the Tidewater Coal Exchange and, upon authority granted by the Chairman of the New England District Coal Committee, the Exchange ordered the coal dumped for Long's account into vessels consigned to the Boston & Maine Railroad and to the Maine Central Railroad.

The Tidewater Coal Exchange (p. 24) was an organization created at the request of the Council

of National Defense by the shippers and transshippers of bituminous coal, and the Tidewater railroads handling such coal at New York, Philadelphia, Baltimore, and Hampton Roads, for the purpose of expediting the release of cars at those ports in the loading of vessels so as to increase the car supply, in order to increase the production of coal which was moving. The idea was to classify coal from various mines into pools according to grade, etc., and have the coal consigned to the Exchange for the account of its owner and distributed by the Exchange without regard to the original ownership, in order to avoid delay in waiting for the owner's own coal to arrive for his particular vessel. This was a voluntary association at first, but the Fuel Administrator, by order of November 6, 1917 (p. 46), made it compulsory for all shippers to ship their coal to the Exchange and be governed by its rules, and the Tidewater railroads agreed to pay the operating expenses of the Exchange for the benefits they derived therefrom in the way of car saving (p. 24). When the Railroad Administration began to function, it approved of the railroad contracts and continued to support the Exchange until Federal control terminated.

Dr. Garfield's order compelling all shipments to come through the Exchange was cancelled as of March 1, 1919, but the Exchange continued in operation until April 30, 1920, by voluntary mem-

bership. On November 1, 1919, as shown by Exhibit 13, page 45, the Railroad Administration restored the Tidewater Coal Exchange as a means of aiding in the distribution of coal.

Following this order, the Regional Director provided a form on which all consumers of coal made application to the Tidewater Coal Exchange for the coal required, which application contained an agreement to pay for the coal. This application would be either approved, modified, or disapproved by the Commissioner of the Exchange, who would, in turn, forward it to the Regional Coal Committee in Philadelphia, which, if it saw fit, would issue a permit to deliver the specified quantity of coal on the order. This permit would be returned to the Tidewater Coal Exchange, which would place the order with the Pier Agent of the Railroad Company to load the coal for the account of the party making the application or his supplier of coal. Coal for New England, however, for a period of five or six weeks, was handled on direct telegraphic request of W. T. Lamoure, Chairman of the New England Subcommittee at Boston. On receipt of telegrams from him, the Exchange would place the orders direct with the pier. Apparently, that was what was done with the coal in question.

It is evident, therefore, that this method of handling coal was not intended by the parties as a commandeering by the United States within the

meaning of Section 10 of the Lever Act. It was purely a method growing out of the necessities of the situation, first, to release coal cars by allowing them to unload immediately upon arrival at Tidewater ports without reference to the ultimate destination of the coal; and, second, to increase the supply of coal by enabling these cars to become available immediately for new loading. The understanding of all the parties was that the ultimate consignee of the coal should pay for it. In the order establishing priority the railroads stood at the head of the list, then followed the Army and Navy and other Departments of the Federal Government, State and County departments and institutions, public utilities, retail dealers, and so forth (p. 54). Pursuant to this scheme, the coal in question was diverted to the New England railroads, used by them, and apparently payment made therefor to F. R. Long & Co. (p. 26) upon some basis not shown.

#### ARGUMENT

The Court below was without jurisdiction to render the judgment now brought up for review

#### I

Of course no court has jurisdiction to entertain a suit against the United States unless authority to bring the suit be conferred by statute. Though the first pleading may upon its face contain allegations sufficient to indicate jurisdiction,

the objection that jurisdiction does not exist may be taken by answer, and when it appears from the facts that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the District Court it is the duty of the court to proceed no further but to dismiss the suit. (*Judicial Code*, Sec. 37; *Northern Pacific Steamship Company v. Soley*, 257 U. S. 216.) Whatever, therefore, the allegations in the statement of claim to the effect that the suit was brought under Section 10 of the Lever Act by reason of the fact that the President had commandeered coal pursuant to the provisions of that Act, when it appeared that the coal was not thus commandeered but was really diverted by the Fuel Administrator for the use of railroad companies which were at the time being operated under Federal control, the suit should have been dismissed, for the District Court had no jurisdiction to entertain a suit against the United States for coal thus diverted and thus used.

If the question of jurisdiction is in issue, and the jurisdiction is sustained, and judgment on the merits rendered in favor of the plaintiff, the defendant may bring the case directly to this Court upon the jurisdictional point. (*United States v. Jahn*, 155 U. S. 109.)

## II

If these two railroads had not been under Government control at this time, and the coal had been

diverted to their use by the Fuel Administrator under preference regulations and the railroads had not paid for it, it will undoubtedly be conceded that the only remedy would lie in separate actions against each railroad company. This court has decided that compliance with regulations of the Fuel Administrator, even though a loss is thereby incurred, will not support an action against the United States. (*Morrisdale Coal Company v. United States*, 259 U. S. 188; *Pine Hill Coal Company v. United States*, 259 U. S. 191.)

The fact that the railroads were under Federal control does not alter the principle. While Federal control lasted the plaintiff could have sued the Director General for this coal under the Act of March 21, 1918, Chap. 25, 40 Stat. 451, and General Order No. 50. (*Missouri Pacific Railway Co. v. Ault*, 256 U. S. 554.) After Federal control ceased the plaintiff could have sued the Agent designated by the President under Section 206(a) of the Transportation Act of February 28, 1920, Chap. 91, 41 Stat. 456, 461. That section reads as follows:

SEC. 206. (a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior

to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes, but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier.

The intent of this section is clear. The Government assumed liability for its acts while operating the railroads and provided an adequate remedy, and, as we claim, an exclusive remedy on any cause of action arising out of Federal operation of a railroad by suit brought against the Agent designated by the President, and such suit must be brought in a court which would have jurisdiction if it were against the carrier rather than the Government. Section 206(b) provides for the service of process upon any agent or officer of the carrier operating the railroad, if such agent or officer is authorized by law to be served with process in proceedings brought against the carrier, and if a contract has been made with the carrier by or through the President for the conduct of litigation arising out of operation during Federal

control, and if no such contract has been made, process may be served upon such agents or officers as may be designated by or through the President. By Section 206(e) provision is made for the payment of judgments out of the revolving fund created by Section 210.

Each railroad operated under Federal control was operated as a separate entity. (*Missouri Pacific Railroad Company v. Ault*, 256 U. S. 554.) Therefore on a cause of action arising out of Federal operation of the Boston & Maine Railroad suit must be brought against the Agent designated by the President, and service must be had on an agent of the Boston & Maine Railroad or some person designated by the President, and the action must be brought in a court which would have jurisdiction over the Boston & Maine Railroad.

### III

- As we have said each railroad under Federal control was operated as a separate entity. The situation was analogous to that which would exist
- if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by Executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the

carriers were not to be affected by the change of control. (*Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554.)

In the latter case Mr. Justice Brandeis, delivering the opinion of the Court, said (pp. 560-562):

The President took over the physical properties, the transportation systems, and placed them under a single directing head; but he took them over as entities and they were always dealt with as such. Bull. No. 4, p. 113. Each system was required to file its own tariffs. General Order No. 7, Bull. 4, p. 151. Each was required to take an inventory of its materials and supplies. General Order No. 10, id. p. 170. Each Federal treasurer was to deal with the finances of a single system; his bank account was to be designated "(Name of Railroad), Federal Account." General Order No. 37, id. p. 313. Each of 165 systems was named individually in the order promulgating the wage awards of the Railroad Wage Commission. General Order No. 27, id. pp. 198, 200. And throughout the orders and circulars there are many such expressions as "two or more railroads or boat lines under Federal control." See General Order No. 11, id. p. 170. It is this conception of a transportation system as an entity which dominates Sec. 10 of the act. The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or exe-

cution upon their property was precluded as inconsistent with the Government's needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whoever, as the party operating the same, was legally responsible under existing law, although it were the Government.

\* \* \* \* \*

If the cause of action arose while the Government was operating the system the "carrier while under Federal control" was nevertheless to be liable and suable. This means, as a matter of law, that the Government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. See *Gracie v. Palmer*, 8 Wheat. 605, 632-633. The title by which suit should be brought—the person who should be named as defendant—was not designated in the act. In the absence of explicit direction, it was perhaps natural that those wishing to sue the carrier should have named the company as defendant when they sought to hold the Government liable. It doubtless seemed, as suggested in *McNulta v. Lochridge*, 141 U. S. 327, 331-332, that suit should be brought against the transportation company "by name 'in the hands of,' or 'in the possession of,' a receiver," or Director General. All doubt as to how suit should be brought was cleared away by General Order No. 50, which re-

quired that it be against the Director General by name.

The principle of this case was reaffirmed by this Court in *Davis, Director General, v. Donovan* (265 U. S. 257), in which it was held that an action against the Director General for alleged negligence in the operation of one carrier could not be maintained by proof of negligence in operation of another carrier, both under his control. In delivering the opinion of the Court, Mr. Justice McReynolds said (p. 264):

Here the Director General came into court to defend only against a liability asserted because of the negligence of agents operating the New York, New Haven and Hartford system and not because of anything which might have been done or omitted by those of another system. In such circumstances, under the statute and orders, we think the court could adjudge no liability against him except such as might have been enforced against the New York, New Haven and Hartford Railroad Company before Federal control. Under those conditions the United States consented to be proceeded against. One reason therefor, if any is necessary, seems plain enough. Every system was operated as an entity; its agents and employees knew and carried on its ordinary affairs, but not those of other carriers. The Director General necessarily relied upon the organization of each system and could demand notice suffi-

cient to set the proper one in motion; otherwise proper defenses might not be presented.

In contemplation of the cessation of Federal operation and the return of the properties to their owners, Congress made provision, under the Transportation Act of February 28, 1920, hereinbefore quoted, for bringing and defending suits thereafter, and at the same time *fixed a period of two years within which they must be brought*. The purpose and intent of this legislation was to afford litigants the same right of action that would have existed against a carrier corporation but for Federal control, following the same procedure and practice as if the action were against the corporation and in the same courts, the only difference being in the designation of the agent of the President instead of the carrier corporation out of the operation of the properties of which the action arose, and in fixing a limitation of time as an aid to a speedy liquidation of the vast liabilities.

In the case of *Davis, Agent v. Dexter & Carpenter, Inc.*, decided by the Circuit Court of Appeals for the Fourth Circuit on September 29, 1924, not yet reported, the court held, pursuant to its former decision in the same case, 281 Fed. 385, that the agent designated by the President under the Transportation Act of 1920 is liable for just compensation for coal seized by a railroad

during Federal operation. In that case the Government does not deny that suit lies against the agent of the President, and that if anyone is liable, he is the proper defendant.

#### IV

When, therefore, the plaintiff alleges the use of its coal by the Government in connection with Federal operation of the Boston & Maine and the Maine Central railroads, it would seem to be plain that the plaintiff's remedy is against the agent of the President, under Section 206(a) of the Transportation Act, by separate suits—one as to the coal used upon the Boston & Maine Railroad and the other the coal used on the Maine Central Railroad. This remedy must be regarded as exclusive. If the plaintiff may maintain this action against the United States, then any plaintiff can maintain a suit for alleged breach of contract arising out of Federal operation in the Court of Claims or in a District Court if less than \$10,000 is involved.

The Lever Act was passed August 10, 1917, while the railroads were under private operation. At that time no suit could have been maintained against the United States under the Lever Act arising out of the use by a railroad corporation of coal obtained by it through the Fuel Administrator. (*Pine Hill Coal Co. (Inc.) v. United States*, 259 U. S. 191.)

After the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, and General Order No.

50, any suit for coal used upon any railroad under Federal operation must have been brought against the Director General in a court which but for Federal operation would have jurisdiction of a suit against the railroad company, and after Federal Control ceased on March 1, 1920, the suit must have been brought against the agent appointed by the President under that Act. Here was a complete, adequate, and, we claim, an exclusive remedy.

The Government's position is not merely technical. The scheme provided by these statutes was necessary for handling in a practical way the exigencies of operation and thereafter the problems of liquidation and accounting. If the plaintiff's position is right, the door is open to a multitude of cases based upon the use by railroads under Federal Control of coal obtained by the Fuel Administrator, without reference to the district in which the cause of action arose or where the records and evidence necessary to its defense may be found and after the expiration of the two-year statute of limitations.

It would mean that the Government would have to bring witnesses, papers, records, and documents from all over the United States to any district which the plaintiff might select for his own convenience. The Government would therefore be put to great and unnecessary expense. It would not be entitled to call upon the carrier cor-

poration in connection with the operation of whose properties the coal was used to defend the action under a contract for the conduct of litigation made in compliance with Section 206 (b) of the Transportation Act. Claimants who have already received payment from the Director General of Railroads for coal used by a railroad under Federal control might grasp the opportunity to inflate their treasuries by suing the United States under Section 10 of the Lever Act for sums alleged to be due as just compensation over and above the amount already paid, as in the case at bar.

The affidavit of defense averred (p. 16) that the coal was purchased under contract from F. R. Long & Company by the railroad companies; and at the close of the trial the United States offered to prove (p. 46) that the coal was actually paid for by the railroads in question to F. R. Long & Company, and plaintiff's counsel admitted (p. 26)—

the payment to F. R. Long & Company of certain sums for the coal in suit,

and objected to the offer of proof on the ground that—

it is irrelevant to show payment to a third party.

This illustrates the practical situation. If this judgment is affirmed, there is no reason why every coal dealer in the United States who furnished coal to the railroads under diversion orders made by the Fuel Administrator and was thereafter

paid the Fuel Administration price should not now sue the United States in any District Court for just compensation upon the theory that his coal was commandeered under Section 10 of the Lever Act.

It is to be noted that Section 206 (a) provided that suits against the agent of the President should be brought within two years from the date of the passage of that Act—that is, not later than February 28, 1922. This suit was not brought until November 1, 1922 (p. 1).

The purpose of Congress in fixing a short statute of limitations is obvious. We must all recognize that it is greatly to the public interest that this tremendous liquidation problem arising out of Federal control of the railroads should proceed speedily to a conclusion.

Our contention that the remedy provided by the Transportation Act is exclusive is therefore supported by the strongest considerations of public interest. The allegation that this coal was taken under Section 10 of the Lever Act is a mere pretense. There was no suggestion that such was the fact at the time the transactions occurred. None of the procedure outlined by that section was followed. The coal was diverted pursuant to regulations made under entirely different authority for the purpose of utilizing the country's supply of coal where it was most needed, and with distinct and wholly different intention regarding the payment for the coal and the rights and liabilities of those who owned it and used it.

Judge Dickinson, in his second opinion (p. 12), recognizes the distinction when he says:

Section 25 of the Act contemplates a wholly different situation. It does not relate to a taking by the United States in the eminent domain sense but the interposition of the aid of the United States in dealing with transportation and supply of fuel under war conditions. Whatever the United States does under Section 25 is an administrative act done in furtherance of the business of transportation companies for them, and in consequence an act to be viewed in law as the act of the Transportation Company.

That is exactly what we claim.

He reasons, however, that since there is no denial of the ultimate liability of the United States, the proposition goes only to the procedural right (p. 15). Indeed, the court below, in rendering its decision, seems to have departed entirely from the proposition that the coal was taken under Section 10 of the Lever Act and to have based its decision really upon the implied contract which arises under the Constitution when private property is taken for the public use, for in his certificate (p. 62) he says:

The judgment was entered in this case in favor of the plaintiff and against the defendant on the ground that the plaintiff had a right of action against the defendant within the meaning of the Fifth Amend-

ment to the Constitution of the United States that there shall no "private property be taken for public use without just compensation."

If this is the real ground of the decision, the lack of jurisdiction of the court to make it is obvious. It then becomes an ordinary Tucker Act case, and inasmuch as it involves more than \$10,000 the Court of Claims has sole jurisdiction.

In suits against the United States, conditions even though some may regard them in popular parlance as merely "procedural" and "technical" may not be so regarded by courts of the United States.

Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with. (*Rock Island, etc., R. R. Co. v. United States*, 254 U. S. 141.)

And there is no authority anywhere which permits a plaintiff, who deems himself injured by some act of the United States, to frame his cause of action in utter disregard of the known facts and the applicable statutes; select his forum at will, and claim the right to recover, irrespective of Congressional action, under the general terms of the Fifth Amendment.

In conclusion, we quote from the opinion of Judge Aldrich, writing for the Circuit Court of

Appeals for the First Circuit in the case of *Shapley v. Cohoon*, 263 Fed. 893:

In view of the urgent insistence of the petitioner before us, it is perhaps permissible to say that the axiomatic rule that courts should at once dismiss proceedings from their control whenever and however want of jurisdiction is seen, whether upon motion, or upon their own discovery, and at whatever stage of the proceedings the discovery may be made, is quite as imperative as the other well-understood rule that requires courts to be jealous and alert in holding and protecting their proper jurisdiction.

Holding a case after discovery of want of jurisdiction would be delaying and obstructing justice, not administering it. Any attempt to deal with this case here would involve a violation of a plain fundamental rule—a flagrant usurpation which would delay ultimate decision in respect to the petitioner's rights—a usurpation which would entail grievous wrongs and consequences upon both parties, and more particularly upon the petitioner, if she has a case of merit. (Id. p. 894.)

The judgment should be reversed.

JAMES M. BECK,  
*Solicitor General.*

ALFRED A. WHEAT,  
*Special Assistant to the Attorney General.*

DECEMBER, 1924.

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# In the Supreme Court of the United States.

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OCTOBER TERM, 1924. No. 444.

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*United States of America*

vs.

*The Archibald McNeil & Sons Company, Inc.*

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## COUNTER STATEMENT OF FACTS.

This case reaches this Court on a Writ of Error raising the question of jurisdiction of the District Court below with Judge's Certificate in accordance with §238 Judicial Code, embodying Act of Congress March 3, 1891. [Transcript of Record, page 62.]

The case below was tried under written stipulation waiving trial by Jury in accordance with §§649 and 700 Revised Statutes [Transcript of Record, page 17]. There was a general judgment in favor of plaintiff [page 60], no special findings, and an opinion of the Court [pages 58-60].

The Statement of Claim [Transcript of Record, pages 3-5] set forth (1) Claim of jurisdiction under Fifth Amendment and §10 of the Lever Act; (2) Shipment of plaintiff's coal for export prior to October 30, 1919, which coal was lying at the piers; (3) Requisition of coal under authority of the Lever Act by the President acting

through the Fuel Administrator, and use of said coal by United States on railroads, then under Federal control; (4) Averments as to value of coal not controverted below or here.

Government moved to dismiss on ground that plaintiff is a citizen of Connecticut and not of Pennsylvania. Trial Judge denied motion and filed opinion [Transcript of Record, pages 6-8].

Government filed Statutory demurrers [Transcript of Record, pages 9-10], and Trial Judge filed opinion overruling objection [pages 10-15]. The principal grounds of demurrer were (1) the requirements with regard to payment of 75% by President, claimed to be condition precedent to any suit; (2) that "taking" was in reality a "diversion" under §25 of the Lever Act; and (3) that any remedy was under Section 206a of the Transportation Act.

The facts developed at the trial were: The coal belonged to the plaintiff, and was, during November and December, lying under the control of the Tidewater Coal Exchange at the Philadelphia and Reading piers. On October 30, 1919, the President, reciting that he acted under the Lever Act, had given full power to the Fuel Administrator [Transcript of Record, page 53], and the Fuel Administrator, on October 31, 1919, also reciting the authority of the Lever Act, had designated "the Director General of Railroads and his representatives to carry into effect" as his agent "diversions of coal" "to railroads" and others [Transcript of Record, page 54]. Baldwin was Regional Director to carry out the orders of the Fuel Administrator [Transcript of Record, page 22]. In such capacity Baldwin notified Howe, Commissioner of Tidewater Coal Exchange [page 22] that "in order to expedite handling, *requisitions* for Tidewater Coal for New England will hereafter be made direct upon you from W. T. Lamoure" [page 32]. This was confirmed by Snyder [page 31], Chairman of Eastern Regional Coal Committee [page 22]. Thereupon a series of orders were issued by direct authority of Lamoure to Howe [page 35] and by

authority of Howe to the coal pier agent [pages 33-34], under which orders the coal in question was requisitioned, shipped to the Boston and Maine and Maine Central Railroads, and used by them. Plaintiff never received one cent for the coal.

The argument below of the Government was that these uncontradicted facts showed what the Government termed a "*diversion*" of the coal and not a "*taking*" under the Fifth Amendment, and that, in any event, the seizure was in accordance with §25 of the Lever Act and no remedy was afforded by §10.

The Trial Judge filed an opinion [Transcript of Record, pages 58-60] disapproving of these contentions and entered a general judgment for the plaintiff [Transcript of Record, page 60]. No special findings were asked for or filed.

A Writ of Error was taken direct to this Court under § 238 Judicial Code, and a Certificate of the Trial Judge [Transcript of Record, page 62] was signed as required by that section.

The statement for the Plaintiff-in-Error adds to the foregoing record facts a discussion of the operations of the Tidewater Exchange, not relevant, since there was no evidence that such operations had anything to do with the "*taking*" of the coal. And the following is stated: "The understanding of all the parties was that the ultimate consignee of the coal should pay for it" [at page 8]. This is categorically denied and the Government is challenged to substantiate such a statement by the Record.

## ARGUMENT.

Since this case is here on writ of error pursuant to a certificate of the trial judge under § 238 of the Judicial Code (embodying Act of March 3, 1891) [Transcript of Record, page 62], no question save that of jurisdiction is involved. That, however, divides itself into two questions:

A. That of *venue*, on the ground that the United States was suable only in the State of the plaintiff's incorporation, and not in the State where the "taking" occurred and the records existed;

B. That of the existence of such a claim to a right of action under § 10 of the Lever Act [40 Stat. 276], as would give jurisdiction to a Federal Court to determine it.

## A. THE QUESTION OF VENUE.

The course of the plaintiff below was to follow the thought of this Court expressed in *United States vs. Seaboard Air Line Ry. Co.*, 261 U. S. 299, wherein it is said: "The Constitution safeguards the right and § 10 of the Lever Act directs payment"—at page 306. The language of this § 10 is:

"Jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies."

Now comes the United States and claims that such suits must be in the district of the plaintiff's residence. Why? There is no limitation in the Act. The United States is as present in Pennsylvania as in Connecticut; there the "taking" was done; there the records are. The several statutes providing for suits against the United States, including the Judicial Code, are careful to state the venue in particular suits; but nowhere is there any general provision or principle of law to be found which makes the State of plaintiff's residence the criterion for jurisdictional venue, save where it is specifically stated, as in the provision respecting diverse citizenship (Judicial Code § 51), or in the Tucker Act § 5 (24 Stat. 505).

Impliedly, this question was ruled in *Houston Coal Co. vs. United States*, 262 U. S. 361. Although the point is not mentioned in the opinion of this Court, it was raised in the Court below, and was of course implicit in a writ of error taken under § 238 of the Judicial Code. The Court below said: "It is urged by the Government that the venue is not here because the plaintiff corporation is a citizen of West Virginia." (Transcript of Record in *Houston Coal Co. vs. United States*, No. 365 Oct. Term 1922, p. 7). But the point was left undecided by the District Court because the case was there determined on other grounds.

A Court will not read into a remedial statute limiting clauses which have not been placed there by Congress. Moreover, as is seen in the policy of the Act of September 19, 1922 (42 Stat. 849), the place where the cause of action arose is not essentially an improper venue.

## B. THE QUESTION OF JURISDICTION PROPER.

The position of the Government that the District Court was without jurisdiction, is not maintainable because:—

I. The District Court had "jurisdiction" within the meaning of Judicial Code § 238 to decide the controversy, even if it decided it wrong;

II. Under all the facts as disclosed by the Transcript of Record, the rulings of the trial judge are correct.

These two propositions will now be argued:—

### I. JURISDICTION EXISTED, EVEN SHOULD THE JUDGMENT HAVE BEEN FOR THE DEFENDANT.

This Court has made it quite clear that its jurisdiction under Judicial Code § 238 to review for lack of jurisdiction below, concerns itself with the jurisdiction of the lower Court as a Federal Court, and is not in any degree equivalent to a motion to dismiss for lack of merit.

In *Fauntleroy vs. Lum*, 210 U. S. 230, it is said: "No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty of the Court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction of the court, dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense"—at pages 234-5.

Again, in *Burnet vs. Desmornes*, 226 U. S. 145, and in *Lamar vs. United States*, 240 U. S. 60, the same principle

is recognized. In the latter case it is said: "Jurisdiction is a matter of power and covers wrong as well right decisions"—at page 64.

But perhaps the best illustration is the recent case of *Binderup vs. Pathé Exchange*, 263 U. S. 291, wherein this Court thus summarized the result of the cases:

"The contention here," the Court said of the plaintiff in error's argument in that suit, "seems to be broadly that where the cause of action is based upon an Act of Congress, unless the complaint states a case within the terms of the Act, the Federal Court is without jurisdiction."

"Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the Court as a Federal Court; and this jurisdiction cannot be made to stand or fall upon the way the Court may chance to decide an issue as to the legal sufficiency of the facts alleged, any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merit, is wanting only when the claim set up in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit \* \* \*. In that event the claim of federal right under the Statute, is a mere pretence and, in effect, is no claim at all."

Now, reading the instant case in the light of these decisions, we find that it was tried in the District Court under written stipulation waiving a jury trial. [Transcript of Record, page 17.] There were no special findings but only a general judgment [page 60]. There is no bill of exceptions but a judge's certificate under

§ 238 Judicial Code [page 62]. Under these circumstances, the Statement of Claim is all that is before this Court to examine whether its averments show jurisdiction. The case of *Lehnen vs. Dickson*, 148 U. S. 71, is a leading authority; and it is there held that, where a case is tried by a judge under the provisions of §§ 649 and 700 R. S., the right of this Court to review a general finding will be "limited to the sufficiency of the complaint and the rulings, if any be preserved, on questions of law arising during the trial." The recent case of *Vicksburg, &c. Rwy. Co. vs. Anderson-Tulley Co.*, 256 U. S. 408, is to the same effect.

The Statement of Claim herein [Transcript of Record, pages 3-5] was modeled, as examination will reveal, on that in *United States vs. New River Collieries Co.*, 262 U. S. 341, and the only material difference is that in the case cited the "taking" was for the benefit of the Navy, whereas in the one at bar the "taking" was, under authority of the Lever Act, by "the President of the United States, acting by and through the Fuel Administrator" and the "coal was received, accepted, retained and used by the United States of America, and used in the operation of various railroads, to wit: Boston & Maine Railroad, Maine Central Railroad; which said use was a public use connected with the common defense." [Transcript of Record, pages 3-4.]

We find next that this § 10 of the Lever Act provides "that the President is authorized, from time to time, to requisition foods, feeds, *fuels*, and other supplies necessary to the support of the Army or Navy, or any other public use connected with the common defense"; that "just compensation" shall be paid, with right to sue the United States; and then the clause concludes: "Jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies."

How can any doubt exist as to the legislative meaning? The suggestion of the Government below was that, since the Statement of Claim discloses that the requisitioning was for the benefit of the railroads, then under

Federal Control, and not for an arm of the Government like the Army or Navy, the use was not a "public use connected with the common defense," and suit under the Lever Act cannot be successfully maintained. But these are questions as to the merits and not of the jurisdiction. If a man's property be requisitioned, and he sues under the section under discussion, surely the "power," that is the jurisdiction, exists to determine every relative question, including interpretation of the section and of the extent of the remedy afforded by it. There is no ambiguity, no suggestion that every issue of law as well as of fact is not within the "power" of the judge to determine. An examination of the Transcript of Record [pages 9 and 10] shows that the legal objections to the Statement of Claim were raised by statutory demurrer (as they should have been) and are really not points of *Federal* jurisdiction at all, even though they sought the dismissal of the suit as showing no cause of action. Indeed, the contention of the Government is foreclosed by the decisions in *United States vs. Pfitsch*, 256 U. S. 547, and in *Houston Coal Co. vs. United States*, 262 U. S. 361.

In the *Houston Coal Co.* case, the District Court had dismissed for want of jurisdiction on the ground that the provisions in § 10 of the Lever Act providing for payment of 75% of the President's award were conditions precedent for jurisdiction, and that, accordingly, when it appeared that plaintiff had been paid 100%, jurisdiction was defeated. That case, like the one at bar, was brought here under § 238 of the Judicial Code, and this Court said:

"The Lever Act was passed in view of the constitutional provision inhibiting the taking of private property for public use without just compensation. It vested the President with extraordinary powers over the property of individuals which might be exercised through an agent at any place within the confines of the Union with many consequent hardships. \* \* \*

"It reasonably may be assumed that Congress intended the remedy provided by each section should be adequate fairly to meet the exigencies consequent upon contemplated action thereunder and thus afford complete protection to the rights of owners. Considering this purpose and the attending circumstances, we think § 10 should be so construed as to give the district courts jurisdiction of those controversies which arise directly out of requisitions authorized by that section."

It is confidently urged that this reasoning applies to the instant case. The suit was brought under the Lever Act, the coal was taken by the United States, and all questions of the use made of the coal, and of the extent of the remedy, were and are questions as to the merits; which issues the court below had "*power*" to determine. Such determination of controversial issues of law and of fact cannot be reviewed as an issue of jurisdiction under § 238 of the Judicial Code; and surely there is nothing colorable in the claims made below, all of which were determined in favor of the plaintiff by a painstaking, able, and learned trial judge. To repeat, the points made by the Government below were questions of substantive and adjective law and not of jurisdiction.

## II. UNDER THE WHOLE RECORD THE RULINGS OF THE TRIAL JUDGE WERE CORRECT.

There is nothing in the entire record of this case which requires plaintiff to rely on any technicality of pleading or other subtlety. Whether or no § 10 of the Lever Act confers jurisdiction to decide all questions arising in a suit brought in good faith under it (as would seem to be the inevitable result of *Houston Coal Co. vs. United States*, 262 U. S. 361); whether or no a general finding when a suit is tried under R. S. § 649 precludes examination of more than the Statement of Claim; the more one inquires into all the facts and all the considerations of law applicable, the more will he be convinced of the unassailable justice and technical strength of plaintiff's claim. The case will accordingly now be argued on the broadest grounds as though every feature of the record were open for discussion.

The Counter-Statement of Facts, *supra*, pages 1-3, makes clear four points:—

*First*, plaintiff was deprived of his coal;

*Second*, the deprivation was by order of the Fuel Administrator;

*Third*, plaintiff never received one cent of compensation;

*Fourth*, plaintiff brought suit, setting forth a right given by the Fifth Amendment and a remedy under the Lever Act, proceeding under § 10 thereof.

We have to consider the objections raised by the Government with detail, doubtless unnecessary because of any difficulty in respect of the principles of law applicable, but put forward because of the issue of financial life and death to the plaintiff.

Even so, we will not reargue the suggestion, foreclosed by *Houston Coal Co. vs. United States*, 262 U. S. 361, that the requirements with respect to payment of 75% of the Government award are conditions precedent of jurisdiction.

The grounds for a dismissal of the suit chiefly urged by the Government in the court below, were:

1. That use on the railroads of coal seized by the Fuel Administrator, was not a "public use connected with the common defense," although such railroads were then under Federal Control;
2. That the "taking of Plaintiff's coal was not a "taking" such as was contemplated by the Fifth Amendment, but was a "diversion" made under § 25 of the Lever Act, affording no remedy under that Act;
3. That remedy, if any, was only under § 206a of the Transportation Act [41 Stat. 456] subsequently passed; action thereunder being now barred by the limitation contained therein.

The last two points seem to be those insisted on in the Brief just filed in this Court.

1. THE USE MADE WAS A "PUBLIC USE CONNECTED WITH THE COMMON DEFENSE."

There are precedents which emphasize the fallacy of the position of the Government on this point. The Federal Control Act [40 Stat. 451] was avowedly legislation based on the War Power; § 16 stated "that this Act is expressly declared to be emergency legislation enacted to meet conditions growing out of war." This was the ground of the decision of this Court in *Northern Pacific Rwy. Co. vs. North Dakota*, 250 U. S. 135; and surely if the railroads were taken into Federal Control by virtue of the War Power, their operation was a "public use connected with the common defense." This situation would have continued until the technical termination of the War by Joint Resolution on March 3, 1921. [41 Stat. 1359]. This Court has held that the moneys of the railroads while under Federal Control are moneys of the United States, and that suits brought by the Director General are suits on behalf of the United States: *Chesapeake & Delaware Canal Co. vs. United States*, 250 U. S. 123; *DuPont vs. Davis*, 264 U. S. 456; *Dahn vs. Davis*, 258 U. S. 421; *Missouri Pacific R. R. Co. vs. Ault*, 256 U. S. 554. Certainly, it was ended by the cessation of Federal Control on March 1, 1920. Therefore, property of individuals requisitioned by the Government for use by the railroads is within the statute. Moreover, in its appropriations, Congress has shown clearly how it regarded the acts of the Fuel Administrator and what was its interpretation of his office. In 1924, it thus appropriates moneys: "For national security and defense, food and fuel administrator, educational, \$4.81." [43 Stat. 60.]

But, in any event, if the "taking" were by Government authority, a plaintiff seeking "just compensation" is not concerned with the use made by the United States. That is a legislative question into which the courts will not inquire, save at times where there is an invasion of private right for a private and not a public purpose, and

the owner of the right homes into court to contest and prevent the "taking." Here the question is not raised by the party whose property has been taken and has been used by the United States in the operation of what was then its own agency; and certainly the United States cannot raise such a question to defeat a recovery guaranteed by the Fifth Amendment, after it has enjoyed the benefit of the property taken.

United States *vs.* Lynch, 188 U. S. 445, is a most instructive case on these questions. The issue therein was as to the jurisdiction of the Circuit Court sitting as a Court of Claims, and the nature of a "taking" within the meaning of the Fifth Amendment was discussed. The Court thus put the question:—

"Was there a taking? There was no proceeding in condemnation instituted by the government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the landowner to the government, and if either of these be an essential element in the taking of lands, within the scope of the Fifth Amendment, there was no taking."

But, said this Court, "if for the want of formal proceedings for its condemnation to public use, the claimant was entitled at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. Kohl *vs.* United States, 91 U. S. 267, 374."

So the Court held that "taking" was a *fact* and that a different "construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of

the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors \* \* \*" at page 470.

In the case at bar, the plaintiff of course had no opportunity to dispute the seizure by the Government of its running coal, and surely the nature of the use cannot now be urged by the Government's counsel as a reason for the denial of all compensation. The plaintiff elects to claim compensation and does not raise any question as to the use. The argument is extraordinary that because a use is private, not public, the Fifth Amendment is powerless to protect the citizen.

2. THE DISTINCTION IS NOT SUSTAINABLE THAT THE "TAKING" OF PLAINTIFF'S COAL WAS NOT A "TAKING" SUCH AS WAS CONTEMPLATED BY THE FIFTH AMENDMENT, BUT WAS A "DIVERSION" MADE UNDER § 25 OF THE LEVER ACT, AFFORDING NO REMEDY UNDER THAT ACT.

Lengthy argument will not be devoted to this position of the Government. A diversion to oneself is surely a "taking," and the Fifth Amendment is not dependent for its efficacy upon any trick of legerdemain or any primitive magic imagined to reside in words. If a citizen can be deprived of his property for use by the Government, without compensation to any extent whatever, by the transparent device of calling it a "diversion," there is an end of the protection of the Constitution. Whatever a "diversion" connotes, it certainly contains the idea of a "taking." And, although of course the language used could not be controlling, it is interesting to note what the actors in this matter of the plaintiff's coal thought when they seized it. "REQUISITION" is the word used. Thus,

Baldwin, Regional Director, says: "In order to expedite handling, *requisition* for Tidewater Coal for New England will," etc. [Transcript of Record, page 32].

G. N. Snider, Chairman Eastern regional Coal Committee [page 22] says: "In order to expedite handling *requisitions* for Tidewater coal for New England will," etc. [page 31].

J. W. Howe, Commissioner Tidewater Coal Exchange, says: to Baldwin: "Acknowledging your telegram eleventh file C-C-four dash fifteen ninety one relative *requisition* for Tidewater coal for New England direct upon me from LaMoure" [page 32].

Lamoure, Chairman of the Sub-committee of the Eastern Regional Coal Committee, located at Boston [page 22] says: "Continue to *requisition* Tidewater coal just as heretofore" [page 32].

If there were any issue of fact as to whether the seizure of plaintiff's coal was a "requisition" or a "diversion," that issue has been determined unimpeachably in favor of the plaintiff by the trial judge acting under § 649 R. S.

In the Government's Brief in this Court, however, this argument takes on a new gloss and permits itself a most surprising assumption, so contrary to the actual facts that it is explainable only by the consideration that counsel here were not counsel at the trial.

This unwarranted assumption is that plaintiff had anything whatever to do with the seizures, that the "regulations" of the Fuel Administration were, as to plaintiff, anything but Government seizures of its property while on wheels. The Government Brief says: "If this judgment is affirmed, there is no reason why every coal dealer in the United States *who furnished coal to the railroads under diversions orders made by the Fuel Administration,*" etc. [at page 19]. *No coal jobber furnished coal to railroads under any regulations. The Fuel Administrator directed the "taking" of the coal when on wheels and by this fact altered the destination of the Way Bill.*

The Government Brief further says that "compliance with regulations of the Fuel Administrator, even though a loss is thereby incurred, will not support an action against the United States," citing the *Morrisdale* and *Pine Hill* cases [at page 10]. [259 U. S. 188 and 259 U. S. 191.]

Plaintiff was not a miner of coal; it had no opportunity or choice of "compliance" with regulations; it learned, after delay, its coal had been "requisitioned," to use the word of the government agents in the transaction; and after long last, it discovered that no one would admit liability for the appropriated property. It is the acme of irony to be now told that its "compliance" with regulations deprives it of remedy for a constitutional right.

3. THE POSITION OF THE GOVERNMENT IS NOT SUSTAINABLE THAT REMEDY FOR THE PLAINTIFF, IF ANY, IS EXCLUSIVELY UNDER § 206a OF THE TRANSPORTATION ACT SUBSEQUENTLY PASSED.

The Government's position will now be destructively analyzed:

After the passage of the Lever Act [40 Stat. 276] and of the Federal Control Act [40 Stat. 451], the President took control of and operated the railroads as a war measure, and such control lasted till February 29, 1920, when the Transportation Act was passed [41 Stat. 456]. His agent was the Director-General of Railroads. The President also undertook the control of coal distribution. His agent was the Fuel Administrator. In January, 1919, the personnel of the Fuel Administration was scattered but a nucleus was kept alive and its operations were suspended. In October, 1919, a great coal strike threatened. The President at once intervened by Proclamation to restore the control of the Fuel Administrator, finding his authority avowedly in the Lever Act. [Proclamation of October 30, 1919; Transcript of Record, page 53.] The following excerpts from the reports of the Fuel Administrator and of the Director General for the year 1919 exhibit the complete situation and the nature of the action taken:

The "Final Report of the United States Fuel Administrator," signed by H. A. Garfield, says:

"OCTOBER 28, 1919.

"HONORABLE JOSEPH P. TUMULTY,  
Private Secretary,  
The White House.

"DEAR MR. TUMULTY:—I shall be obliged if you will bring the following to the attention of the Cabinet at its meeting today as a report upon the question whether the Fuel Administration should

undertake the distribution of coal produced in the days immediately preceding November 1st.

"Last Saturday the Cabinet authorized me to confer with Dr. Garfield on this subject \* \* \*

"\* \* \* Dr. Garfield telephoned me yesterday afternoon expressing doubt as to the wisdom of his undertaking to handle this matter through the Railroad Administration and expressing the preference for its being handled through the Secretary of the Interior \* \* \*

"My judgment is that it would be better to request Dr. Garfield to take control of this situation and make the desired allocation not only of coal on hand at the beginning of the strike but of coal produced during the strike. It seems to be it would be unfortunate and would raise unnecessary question to attempt to make a transfer of the functions of the Fuel Administration from Dr. Garfield to any other person.

"I therefore submit the matter for the action of the Cabinet. As I look at it the questions are as follows:—

\* \* \* \* \*

"If the Government desires to control this matter, shall it be done through Dr. Garfield or shall his powers be transferred to another agency of the Government?

"In the absence of such control the Railroad Administration will, of course, take the steps necessary to protect itself, but this will afford no relief to other public utilities and they may lose substantial amounts of coal which will therefore go to consignees who have no corresponding need for it.

"Sincerely yours,

"WALKER D. HINES."

"29 OCTOBER, 1919.

"DIRECTOR GENERAL WALKER D. HINES,  
U. S. Railroad Administration,  
Washington, D. C.

"DEAR MR. HINES:—I am obliged to you for sending me a copy of your letter of yesterday to Mr. Tumulty. My suggestion, that the proposed distribution of coal be handled through the Secretary of the Interior, grows out of a plan laid before the President last February. As finally elaborated, it involved, as you remember, among other things, the designation of the Secretary of the Interior as Chairman of an advisory committee, composed in equal part of mine workers and operators and having for its object the consideration of all questions affecting either the public or labor and capital engaged in the bituminous coal industry.

"On his return from Paris in the spring, Secretary Baker stated to me that the President approved of the plan and has asked him to inaugurate it. Due to difficulties, of which I am not full informed, the plan was not inaugurated, greatly to my regret, for I believe it would have gone far to prevent the crisis which is now impending. With these circumstances in mind, it naturally occurred to me to suggest that Secretary Lane be authorized to make the proposed distribution of coal. However, the action of Congress in refusing to make an appropriation for the Fuel Administration after July 1 of this year and the ruling of the Comptroller of the Treasurer on the President's proposal to turn over funds—as per the cables exchanged June 11 and 14 last—have left the United States Fuel Administration without power to function in this crisis.

"Your suggestion that I indicate the basis of the distribution and *utilize the Railroad Administration's field force in carrying it out* (italics not in original) raises the question whether it would not be prefer-

able that you be authorized to act in this emergency, especially if for any reason it still seems inadvisable to set up the advisory commission recommended in the plan above referred to.

"I therefore suggest that if action is now to be taken my resignation be accepted and that you or Secretary Lane be appointed United States Fuel Administrator. In view of your intimation that I indicate the basis of the distribution of coal, I venture to suggest further that the following course be pursued in the present crisis:—

"*First:* That the order covering maximum prices of bituminous coal, suspended as of February 1, 1919, be forthwith rescinded, thereby reestablishing Government maximum prices. It is important to note that the price regulations were suspended and not cancelled and that all contracts entered into since that date are subject to the cancellation of the suspension order. In other words, that contracts for prices higher than the maximum Government prices will not stand in the face of such an order.

"*Second:* That all coal in transit be *at once taken over* and distributed and on the basis of the preferential list formerly in force, excepting, of course, munition plants. All coal thus diverted would be billed at the Government's maximum prices.

"*Third:* That the Secretary of War at once issue orders to prevent interference with the production of coal by those who choose to work and with the distribution by Agents of the Fuel Administration.

"Sincerely yours,

"H. A. GARFIELD."

The Report then proceeds as follows:—

"The letter of October 29 to Mr. Hines was read at the meeting of the Cabinet on the morning of

October 30, which was attended by Mr. Hines and Mr. Garfield. The resignation of the latter was not accepted. By order of the President, Government maximum prices were restored and the Fuel Administrator authorized to make such rules or regulations \* \* \* as in his judgment should seem necessary."

The Annual report of the Director General of Railroads for the year 1919 states:—

"The general strike of the mine workers on November 1 resulted in the Fuel Administrator again taking charge of the situation and revoking the suspension of his previous orders regarding coal prices and priorities. At his request and *acting by his authority* the Railroad Administration undertook the distribution of the available supply, and this work was placed in charge of the Director of this Division \* \* \*

"At midnight on October 31 the Railroad Administration *took and held all* of the bituminous coal then in its possession and from that time actively directed the distribution of the entire available supply to all essential consumers, in accordance with the priority orders of the Fuel Administrator."

It is thus conclusively shown that the acts of the Railroad representatives were by authority of the Fuel Administrator, and that the authority of the Fuel Administrator came from (a) the Lever Act and (b) the Proclamation of the President of October 30, 1919; which authority was exercised by the Order of October 31, 1919, appointing as the Fuel Administrator's agents "the Director General of Railroads and his representatives." [Transcript of Record, page 54.] The Director General's acts *qua* the "taking" or "diversion" or "requisition" of coal (whatever the word used), were done by virtue of the authority transferred to him creating him and his representatives agents of the Fuel Administrator.

*It is the failure to recognize this fact and its implications which constitutes the fallacy in the Government's position.*

On and after October 30, 1919, then, till the ending of Federal control on March 1, 1920, the Fuel Administrator continued, to use the words of the Report, to "take," "hold," and "distribute" all coal coming into the possession of the railroads. Such action had nothing to do with the regulations affecting *producers*, who were required to ship under certain conditions, and whose situation is considered in *Morrisdale Coal Co. vs. United States*, 259 U. S. 188. No choice was afforded *jobbers* whose coal was on wheels and was "taken" without further ado.

In *United States vs. Pfitsch*, 256 U. S. 547, this Court carefully considered the effect of the several sections of the Lever Act and particularly of § 10. The effect of that decision was to hold that under §§ 12, 16 and 25 jurisdiction was conferred upon the Court of Claims exclusively (except where the amount did not exceed \$10,000), and under § 10 upon the District Courts along sitting as common law courts with trial by jury. This Court takes occasion to say that the legislative history of the Act established that this difference was the result not of inadvertence but of deliberate action in the face of opposition.

Under the sections referred to of the Lever Act, the President was given power to requisition: "(a) Foods, feeds, fuels," etc., (§ 10): "factory, packing-house, oil pipe line, mine and other plant," (§ 12), and distilled spirits (§ 16). Under § 25, power was given:

- (a) To fix prices of coal and coke;
- (b) "to regulate the method of production, sale, shipment, distribution, proportionment or storage thereof."

If, in the opinion of the President, such orders were not satisfactorily obeyed, power of requisitioning the business was given. As above stated, remedies for

requisition were given by right of action in the Court of Claims under §§ 12, 16 and 25, and in the District Courts under § 10.

"Regulations" were authorized by § 25. If such "regulations" were not obeyed, then right of requisitioning a coal mine was given; but there is no evidence of the slightest intent that "regulations" should be so interpreted as to permit of a requisitioning of coal on wheels which should avoid the provisions of § 10 affording "just compensation."

One should first consider the effect of the Statute on acts done thereunder, *prior* to the passage of the Transportation Act, Feb. 28, 1920. [41 Stat. 456.] The individual was guaranteed the right of just compensation by the Fifth Amendment. Congress passed a series of Acts recognizing this fundamental right and affording different means for its recognition and enforcement. Indeed, any act of Congress which did not afford such relief would have been unconstitutional. There is not the slightest suggestion that the provisions of the Lever Act were not fully adequate, and the "takings" authorized thereunder constitutional. But it is a relevant consideration that the interpretations of the Act should be such as to make it constitutional and attribute to Congress the intention, which they undoubtedly possessed, to afford full relief to citizens whose private property was taken for public use. Thus, even if it could be argued that "regulation" under § 25 could mean the requisitioning of coal on wheels, yet a constitutional interpretation would treat such a regulation as amounting to a requisition giving remedy under § 10. The "taking" of coal on wheels from a private owner for the benefit of the Government was undoubtedly a requisitioning. Either such requisitioning permits remedy to be afforded under § 10, or the provisions of § 25 were unconstitutional; a result which this Court will avoid under the rules of statutory construction.

At the period when this coal in suit was taken, to wit, the winter of 1919, the Transportation Act had *not* been

passed. The only constitutional interpretation, therefore, of the power of "taking" offered by the Act was to permit recovery under § 10 or to infer an implied contract and allow recovery under the Tucker Act. But it is quite obvious that it is difficult to infer an implied contract to afford a remedy under the Tucker Act for requisitioning, when, in the very act permitting requisitioning, the remedy is explicit after the discussion of an amendment thereto, giving jurisdiction to the District Courts as courts of common law (see *United States vs. Pfitsch*, 256 U. S. 547). Moreover, the Court of Claims has already held flatly that, under these circumstances, no remedy exists in the Court of Claims but only under § 10 of the Lever Act: *Corona Coal Company vs. United States*, 56 Court of Claims 390; *General Chemical Company vs. United States*, 57 Court of Claims 94. The Government itself in those cases objected to the jurisdiction of the Court of Claims; and indeed it is hard to see how an implied contract could be worked out of the Lever Act in view of the express jurisdiction conferred by § 10. Moreover, the question is not an academic one, because, if the jurisdiction were in the Court of Claims, "taking" would not permit either of a jury trial (*United States vs. Pfitsch*, 256 U. S. 547) or of the recovery of interest (*United States vs. N. American Company*, 253 U. S. 593).

One must therefore conclude that a "taking" is an actual fact and is not a question of metaphysics or of verbiage. Therefore, if a "regulation" was that the coal should be "taken," that constituted precisely a requisitioning, remedy is afforded by § 10 of the Lever Act, and the Court of Claims would have no jurisdiction to afford relief for such a regulative requisitioning.

But, said the government below, "the remedy, if any, was by a suit against the agent designated by the President under Section 206a of the Transportation Act." [41 Stat. 456], [Transcript of Record, page 10.] It is rather extraordinary that the remedy should be under an

act passed months later than the "taking," compensation for which is sought. Of course it was competent for Congress later to afford a different or a cumulative remedy for a transaction which had occurred. But this would not affect the interpretation of the Lever Act, as it stood at the time of passage, with respect to the reconciliation of its constitutionality and with respect to the applicability of remedies under the Tucker Act.

We must examine further into this question:

(a) The language and purpose of the Transportation Act were not primarily intended to include suits for requisitions against the United States.

Taking the language as it stands, it speaks of actions arriving out of the "possession, use, or operation by the President of the railroad of any carrier \* \* \* of such character as prior to Federal control could have been brought against such carrier." How can such language be construed to mean exercise of eminent domain by the United States? It is quite evident the statute has in mind a *particular* railroad and liabilities arising out of its "possession, use or operation." The seizure of coal by the Director General was a *general* act done as *agent of the Fuel Administrator* and can not be said to have involved the particular railroad on which the coal was, especially since the coal may have been and often was used by another railroad or even a third party.

The latest decisions of this Court have made it quite clear that no suit will lie against the Director General in his *general* capacity. *Davis vs. Donovan*, 265 U. S. 257. The coal in the case at bar was not requisitioned by the Maine Central or by the Boston & Maine Railroads, but by the President acting through the Fuel Administrator. It would be quite impossible for plaintiff to determine which carloads of coal reached which railroads; and in other cases of the same nature the applications are more far-reaching. Who shall be served with process? Is it (a) the one on which the coal in transit

was when it was diverted from consignee? (b) The railroad which received it and under new orders passed it on? (c) The ultimate consumer? And (d) what if the ultimate consumer be a private corporation favored by the kindness of a railroad for whom the coal was first seized? Is a series of bills of discovery to be filled to determine who finally got the coal? Otherwise, who can be sure whom to sue? Often no notices were served, and even a notice proves nothing as to who finally used the coal. Cases exist where the coal passed through ten hands. And in the instant case, where the coal was dumped into barges and mingled with other coal, how can anyone in the world say whether the Maine Central burned in its locomotives all of plaintiff's coal or none of it?

Consideration will uncover the unworkability of the Government's theory as to compensation to the plaintiff. Plaintiff's coal is taken while on wheels and at the Philadelphia & Reading piers by order of the Fuel Administrator. The coal is dumped with a lot of other coal into the barges of Long & Co., with whom plaintiff has no relations at all. Long delivers it to the Maine Central & Boston Maine Railroads. These railroads do not know whose coal it is; they never heard of the plaintiff in that connection; they treat Long & Co. as the owner and pay him. When, long after these events, search by plaintiff develops the facts, The Philadelphia & Reading R. R. will not pay plaintiff because they acted by order of the Fuel Administrator; the Maine Central & Boston Maine Railroads will not pay plaintiff because they did not get the coal from it but received barges full of unsegregated coal from Long & Co., with whom they had a contract. Long & Co. say to plaintiff, "What have we to do with you? We have our own accounts to settle with the Fuel Administrator and we decline to recognize you at all in the transaction." On what theory of law can suit be brought against any of those concerned other than the United States acting through the Fuel Administrator

for what was his act and none's else? The Director General of Railroads is not *generally* responsible (Davis & Donovan, 265 U. S. 257). The Lever Act, § 10, points out the adequate remedy whereas the Transportation Act, § 206a, however properly available in simple cases, affords no real remedy for this plaintiff.

When the bill which became the Transportation Act was before the House, the members of the Committee in charge upon the floor thus explained section 206a:

"MR. SANDERS OF INDIANA: Those causes of action which arise through Federal control are provided for in this section and by an amendment pending actions are provided for, and this provides that a suit can be brought against the United States Government at any place in the country. It is a very liberal provision for suing the Government. The Government took over these railroads, and operated them, and torts and contract obligations arose, and they are really actions against the Government, and in pursuance of that idea the Director General provided that suits should be brought against him. This carries it on further and makes liberal provision that the United States may be sued in any jurisdiction of the land where he could have been sued." Cong. Rec. Vol. 58 Part 8, page 8400.

Where is there the slightest suggestion here of eminent domain cases? Of a *pro tanto* repeal of the Lever Act? Of the declaration of *exclusive* rights of action?

The truth is that the Transportation Act was an enlarging substantive act whose purpose was to afford redress to the many who suffered under Federal operation and who had been in great doubt and perplexity as to their remedies all over the country. They had had rights of action, but these had been given under Executive Orders for a large part, and the Act of 1918 had not in some respects been construed to afford relief. Accord-

ingly the Act of 1920 was made comprehensive so far as operation went, but it is submitted that no thought can be spelled out that a seizure by the United States under the Lever Act (for which a remedy was expressly given in that Act) was to be exclusively redressed in a multitude of suits against a hundred railroads if one were fortunate to guess aright as to liability. The United States took under one Act; they should answer under that Act.

The above considerations are not intended to support the position that no action would lie against a railroad under an implied contract to pay in the simple case when coal was seized on its lines and used by it, but this is a very different question from the position that the Transportation Act was intended to afford exclusive relief for a "taking" in the nature of a requisition, or that, under the facts of the present case, plaintiff could have been given full relief thereunder.

(b) In any event, the passage of the Transportation Act has not the effect of an implied *pro tanto* repeal of § 10 of the Lever Act.

Implied repeals are not favored.

Sutherland on Statutory Construction is perhaps the best authority and he says as follows:—

"Repeals by implication are not favored. This means that it is the duty of the Court to so construe the acts, if possible, that both shall be operative.  
\* \* \* There must be such a manifest and total repugnance that the two enactments cannot stand" at pages 465-6.

"A subsequent statute which institutes new methods of proceeding does not, without negative words, repeal a former statute relative to procedure. The statute authorizing a proceeding to contest the validity of a will 'by petition to the court of common pleas' does not repeal the provisions of the

former statute authorizing a proceeding by bill in chancery. \* \* \* A statute giving a new remedy does not take away a remedy previously existing" at page 498.

State *vs.* Martin, 68 Vermont 93, is a good illustration. Therein was involved a question of remedy for abating a nuisance where a new act had been passed and procedure was based on the old one. The Court said: "A repeal by implication is not favored. Although every statute is, by implication, a repeal of all prior statutes on the same subject, so far as it is contrary and repugnant thereto, and that without any repealing clause, it is not a repeal if it be possible to reconcile the two acts of the legislature together. A repeal by implication is permitted only in cases of very strong repugnancy or irreconcilable inconsistency such as does not exist in this case" at page 94.

In the case of United States *vs.* McGrane, 270 Fed. 761, the suit was under § 10 of the Lever Act for the taking of land under that section. The point argued by the Government was that the Act of March 2, 1919 (40 Stat. 1272) repealed this § 10 of the Lever Act. The Court said:

"By the Act of 1917, jurisdiction had been 'conferred on the United States District Courts to hear and determine all such controversies,' namely, those arising under the act. No suggestion is now made, and in the absence thereof we are justified in concluding that none were or could have been made to Congress, that the jurisdiction thus conferred by Congress in the District Courts was unsuitable in process or had proved unsatisfactory in performance. In the absence, therefore, of any call for changing this jurisdiction, and in the absence of any expression or implication in the statute to repeal, supersede, or affect the Act of 1917, and in view of the fact that such widespread change in the status of

the then accrued war claims under it, would naturally and reasonably have been evidenced in express enactments, and not be left to implication, we cannot attribute to Congress, and to the Act of 1919, an intent to repeal the statute of 1917. \* \* \* To turn such a validating, enabling, and enlarging statute into a repealing statute would be to run counter to the spirit and purpose which led to its passage." (At page 763.)

This language is equally applicable to the present contention of the Government that the Transportation Act operates to negative the beneficent intentions of Congress to afford remedy under the Fifth Constitutional Amendment, where railroads received coal from the Fuel Administrator.

But perhaps the most important consideration of all is that Congress seems to have foreseen what might happen in the way of the ingenuities of counsel and to have expressly provided that there should be no mistake in the protection of the constitutional rights of the citizen. § 24 of the Lever Act provides: "That the provisions of this Act shall cease to be in effect when the existing state of war between the United States and Germany shall be terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President; but the termination of this Act shall not affect any act done, or any right or obligation accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said termination pursuant to this Act; but all rights and liabilities under this Act arising before its termination shall continue and may be enforced in the same manner as if the Act had not terminated."

The situation developed in the case of *Atlantic Refining Co. vs. United States*, decided by the Court of Claims on Jan. 14, 1924, is instructive. Certain petroleum products were taken by the Government, which purported to act under the Acts of March 4, 1916 (39 Stat.

1192) and June 15, 1917 (40 Stat. 182). Then came the Lever Act. Suit having been brought in the Court of Claims, the Government objected to the jurisdiction as to all deliveries after Aug. 10, 1917, citing the decision in the case of *United States vs. Pfitsch*, 256 U. S. 547. The Court of Claims reviewed the legislation and held that there should be no application of implied repeal and that, "Congress having granted the authority and provided the remedy, it is difficult to perceive an attempt to materially alter the remedy alone, in the midst of war, and create an incident confusion in the large number of instances where the power had been exercised in good faith under prior laws." By parity of reasoning, the provisions of the Lever Act should not be considered as having been *pro tanto* repealed by the passage of the Transportation act so as to deprive now this plaintiff of his remedy under the Lever Act for acts done by express declaration under the authority of that same Act.

Moreover, the argument that the Transportation Act operated in some fashion to repeal *pro tanto* the remedy afforded by the Lever Act, loses all force when it is perceived that it could not have such an effect with reference to requisitions for the army or navy or any third party save the railroads themselves. In seizing and diverting the coal, the Director General acted avowedly under the orders of the Fuel Administrator and the Fuel Administrator avowedly under the Lever Act [Order of October 31, 1919; Transcript of Record page 54]. The Railroad Administration was therefore not responsible, save perhaps when the railroads themselves used the coal. And then the fact of *use* and not of *taking* is the basis of responsibility: which consideration in itself demonstrates that remedy for the taking provided by the Lever Act § 10, is the one appropriate and adequate remedy.

No: a partial, imperfect repeal of a statutory remedy for acts already done and constitutional rights created, is not to be *implied*. In the case at bar there is no necessary repugnancy whatever between the Transportation Act section 206a and the Lever Act section 10. Both may and should stand together.

It is a relevant fact that the statute of limitations bars actions under the Transportation Act but not under the Lever Act. This is not by chance. Claims arising through torts and contracts should be cleaned up quickly; but a very different situation confronts a man who has to search records for coal that has been taken from him, he knows not how or when or by what agent of the Fuel Administrator. Surely Congress can not readily be presumed to have shut the door in the face of the man whose property they have seized.

The Government's Brief would seem to assume that plaintiff's position is based in some fashion on the fact of Federal Control of the railroads in late 1919. Not at all. The claim may be stated categorically thus:

The Lever Act authorized taking of plaintiff's coal;

The Lever Act provided by § 10 a remedy for requisition;

The "taking" was by the Federal Agency of the Fuel Administrator;

The remedy was by § 10.

It is also true that:

The coal was used by the railroads;

They were then under Federal Control;

This emphasizes the public character of the use: it has no further effect.

It is unnecessary to allow oneself to be led far aside by the assumptions of counsel but one or two points should be noticed:

"If the plaintiff may maintain this action against the United States, then any plaintiff can maintain a suit for alleged breach of contract arising out of Federal operation in the Court of Claims" [at page 17]. What is the possible sequence of reasoning leading to such a conclusion?

"If these two railroads had not been under Government Control at this time, and the coal had been diverted

to their use by the Fuel Administrator under preference regulations and the railroads had not paid for it, it will undoubtedly be conceded that the only remedy would lie against each railroad company" [at pages 9-10]. No such concession will be made! If the so-called "preference regulation" was directed to a miner who furnished the railroad, as in the Morrisdale case, that conclusion would follow. But, if the "preference regulation" were in verity a "taking," the United States would be liable under § 10 of the Lever Act.

"It would seem to be plain that the plaintiff's remedy is against the agent of the President, under Section 206a of the Transportation Act, by separate suits—one as to the coal used upon the Boston & Maine Railroad, and the other the coal used on the Maine Central Railroad. This remedy must be regarded as exclusive" [page 17]. And this in face of the uncontradicted and uncontradictable evidence that, by the Act of the Fuel Administrator, no human power could ever have determined how much, if any, of plaintiff's coal each railroad got!

Finally, the Government Brief allows this amenity to escape: "The allegation that this coal was taken under § 10 of the Lever Act is A MERE PRETENSE." Thus of the judgment of the learned and just judge below, to pass over the firm and considered opinion of counsel! But the Government should certainly not indulge in criticisms of the sincerity of one's colleagues at the bar so long at least as the record in this case and in that of the United States *vs.* Newton Coal Co. (Nos. 709-10) lies open for comparative inspection.

With zeal to deprive coal dealers of all compensation for requisitioned coal used by railroads, counsel, at one and the same time, were filing the following claims of law:

*Demurrer in Case at Bar: Assignment of Error in New-*

"7. Plaintiff's remedy, if any, was by a suit against the Agent designated by the President under section 206 (a) of the Transportation Act." [Transcript of Record, page 10.]

*ton Coal Co. vs. Davis, 281 Pa. 34:*

"22. \* \* \* Plaintiff's remedy, if any, was by a suit against the United States in accordance with the provisions of Section 10 of the Act of Congress approved August 10th, 1917, 40 Stat. L. 276."

This is the manner in which the Government argued in the Supreme Court of Pennsylvania:

"It is submitted that the actions should have been brought against the United States, as what is alleged to have been done by the defendant, namely, the confiscation of the plaintiff's coal, was done by the defendant purely in his capacity as Agent of the Fuel Administrator and had nothing whatever to do with his operation of the railroads. The Transportation Act, Section 206, only allows suits against the Agent designated by the President if based on causes of action arising out of the possession, use or operation by the President of the carriers during Federal Control and it is clear that the causes of action at bar do not arise out of the possession, use or operation by the President of the Railroads involved during Federal Control. They arise out of the regulations issued pursuant to the Lever Act and the mere fact that the Railroads were under Federal Control at the time has no bearing whatever on the matter. If the Railroads had not been under Federal Control the plaintiff's redress for any violations of its rights in having coal seized would have been just the same, that is, by an action against the authority who seized the coal, which was the United States, acting through the Fuel

Administrator and his Agents, in this instance the Agent being the Director General of Railroads, and not by an action against the party to whom the coal was delivered, perhaps without such party's consent.

"Neither the Director General of Railroads, who operated the Railroads during the war, nor the Agent provided for in Section 206 of the Transportation Act, 1920, the latter being the defendant in these two actions, is the United States. \* \* \*

"The mere fact that the Director General of Railroads had been given the authority by the Fuel Administration to make diversions of coal does not change the situation, for in making such diversions he was acting in a different capacity from that in which he acted in receiving coal, as pointed out above and conceded by the Court below. \* \* \*

"It follows from the above that plaintiff cannot recover in these cases because *it should have sued the United States under Section 10 of the Lever Act* and there is no liability to the plaintiff on the part of these defendants who received the coal requisitioned by the Fuel Administration."

So ends the brief signed by the counsel for the Director General operating the Pennsylvania and the Reading Railroads. Comment is unnecessary, but we will indulge just once more in parallel columns:

*Government Brief herein*  
[pages 9-10]:

"If these two railroads had not been under Governmental control at this time \* \* \* it will undoubtedly be conceded that the only remedy would lie in separate actions against each railroad company."

*Railroad Administration*  
*Brief in Nos. 709-10 above*  
*quoted.*

"If the railroads had not been under Federal Control, the plaintiff's redress for any violations of its rights in having coal seized would have been just the same, that is, by an action against the authority who seized the coal, which was the United States, acting through the Fuel Administrator and his agents, in this instance the agent being the Director General of Railroads, and not by an action against the party to whom the coal was delivered, perhaps, without such party's consent."

Counsel for plaintiff would respectfully urge that not lightly should the Lever Act be declared no longer operative, when that Statute was intended to protect a constitutional right. Stripping the argument of its technicalities, this Court is asked to dismiss the plaintiff hence without pay for his coal and without hope now to secure pay, because plaintiff thought it could rely on the Act of Congress under which its coal was taken. Congress had expressly provided in the Act authorizing "taking" that right of action should survive the termination of the Act; but now the Government says that another Act of Congress (which certainly does not show such intention on its face) would have afforded relief to plaintiff under this and the other pending suits by sending it to over twenty-five different railroads spread over the United States to seek redress for general acts done

in the East by the Director General acting under the orders of the Fuel Administrator; and that, not having divined this situation, plaintiff must now lose all compensation. Even this is not all. For, his right to recovery is to be made to depend on facts that plaintiff could not know. If the coal, in a supposititious case, were seized while on the Baltimore & Ohio lines and sent to the Philadelphia & Reading, plaintiff's remedy under the Transportation Act is said to be against the Philadelphia & Reading *if the latter Company used the coal*. If plaintiff sued the Baltimore & Ohio, it must fail; but again, if the Philadelphia & Reading turned the coal over to another railroad, plaintiff must fail in his suit against the Philadelphia & Reading. While still again, if a third party other than a railroad eventually got the coal, the plaintiff would now return for relief to the Lever Act. And what if the coal, as in the initial case, has lost all identity after being "taken" and before being used? Congress certainly never intended any such results. This Court, by its decision in *Davis vs. Donovan*, 265 U. S. 257, disapproves any *general* suit against the Director General of Railroads, and no *separate* suits could afford plaintiff relief. The intention of Congress in the first instance was to give a remedy for the constitutional right of "just compensation" by § 10 of the Lever Act, and there is not the slightest indication anywhere that the passage of the Transportation Act evinces an alteration of that intent.

It is submitted that the judgment below should be affirmed.

CHARLES H. BURR,

*Attorney for Defendant in Error.*

UNITED STATES *v.* ARCHIBALD McNEIL & SONS  
CO., INC.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 444. Argued January 9, 12, 1925.—Decided March 2, 1925.

1. In the absence of a bill of exceptions or special findings, the jurisdiction of the District Court over a law case tried by stipulation without a jury is determinable, on direct appeal to this Court, only upon the questions of law apparent on the face of the pleadings. P. 307.
2. An action in the District Court to recover just compensation for goods alleged to have been commandeered or requisitioned under the Lever Act, may be brought, under § 10 of that statute, in the District where the seizure occurred. *Id.*
3. Where a statement of claim filed in the District Court under § 10 of the Lever Act sought recovery of the value of coal alleged to have been requisitioned under that act by the President through the Fuel Administrator and used by the United States in the operation of various railroads—"a public use connected with the common defense,"—*held* that objections raised by demurrer, in terms questioning the jurisdiction upon the grounds that there had been no preliminary determination of value, and partial payment, as contemplated by the statute, and that the cause of action was for a diversion of the coal, under § 25, remediable only by action against the agent designated by the President under § 206 (a) of the Transportation Act, 1920,—did not go to the jurisdiction of the court but concerned the merits. *Binderup v. Pathé Exchange*, 263 U. S. 291. *Id.*

Affirmed.

JURISDICTIONAL appeal, under Judicial Code, § 238, from a judgment of the District Court awarding compensation for coal taken by the Government.

*Mr. Alfred A. Wheat*, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Whatever the allegations in the statement of claim to the effect that the suit was brought under § 10 of the Lever Act by reason of the fact that the President had commandeered coal pursuant to the provisions of that act, when it appeared that the coal was not thus commandeered but was really diverted by the Fuel Administrator for the use of railroad companies which were at the time being operated under federal control, the suit should have been dismissed, for the District Court had no jurisdiction to entertain a suit against the United States for coal thus diverted and thus used.

If these two railroads had not been under government control at this time, and the coal had been diverted to their use by the Fuel Administrator under preference regulations and the railroads had not paid for it, it will undoubtedly be conceded that the only remedy would lie in separate actions against each railroad company. Compliance with regulations of the Fuel Administrator, even though a loss is thereby incurred, will not support an action against the United States. *Morrisdale Coal Co. v. United States*, 259 U. S. 188; *Pine Hill Coal Co. v. United States*, 259 U. S. 191.

The fact that the railroads were under federal control does not alter the principle. While federal control lasted the plaintiff could have sued the Director General for this coal under the Act of March 21, 1918, c. 25, 40 Stat. 451, and General Order No. 50. *Missouri Pacific R. Co. v. Ault*, 256 U. S. 554. After federal control ceased the plaintiff could have sued the Agent designated by the

President under § 206 (a) of the Transportation Act of February 28, 1920, c. 91, 41 Stat. 456, 461.

Each railroad operated under federal control was operated as a separate entity. *Missouri Pacific R. Co. v. Ault, supra*. Therefore on a cause of action arising out of federal operation of the Boston & Maine Railroad suit must be brought against the Agent designated by the President, and service must be had on an agent of the Boston & Maine Railroad or some person designated by the President, and the action must be brought in a court which would have jurisdiction over the Boston & Maine Railroad.

The Lever Act was passed August 10, 1917, while the railroads were under private operation. At that time no suit could have been maintained against the United States under the Lever Act arising out of the use by a railroad corporation of coal obtained by it through the Fuel Administrator. *Pine Hill Coal Co. v. United States, supra*.

After the Federal Control Act of March 21, 1918, and General Order No. 50, any suit for coal used upon any railroad under federal operation must have been brought against the Director General in a court which but for federal operation would have jurisdiction of a suit against the railroad company, and after federal control ceased, on March 1, 1920, the suit must have been brought against the Agent appointed by the President under that Act. Here was a complete, adequate, and, we claim, an exclusive remedy.

*Mr. George Deming*, for defendant in error. *Mr. Charles H. Burr* was on the brief.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

Seeking to recover \$17,422.32 as compensation for 3,840.9 tons of bituminous coal, defendant in error, a

Connecticut corporation, instituted this action against the United States by filing statement of claim in the United States District Court, Eastern District of Pennsylvania.

It alleged—

That jurisdiction of the action arises under the Fifth Amendment and the tenth section of the Lever Act, c. 53, 40 Stat. 276, 279.

That the coal in question had been shipped from the mines under valid contracts during the first part of October, 1919, was owned by the claimant, and prior to October 30, 1919, was at Port Richmond Piers, Philadelphia, or at Port Reading Piers, New Jersey.

That "by virtue of the authority conferred by the aforesaid Act of Congress, the President of the United States, acting by and through the Fuel Administrator at Port Richmond Piers, Philadelphia, or at Port Reading Piers, New Jersey, commandeered and requisitioned" this coal during November and December, 1919. "The said coal was commandeered and requisitioned from or through the Commissioner of the Tidewater Coal Exchange, the Superintendent of Transportation of the Philadelphia & Reading Railroad Company, the Shipping and Freight Agent of the United States Railroad Administration at Port Reading Terminal Piers, New Jersey, the Bituminous Coal Distribution Committee, the Regional Coal Committee, the Philadelphia & Reading Railroad Company, the Port Reading Railroad Company, the Federal Treasurer at Port Reading Terminal Piers of the United States Railroad Administration, and the Jamison Coal & Coke Company, the vendors of the said coal to the plaintiff. All of the aforesaid coal was received, accepted, retained and used by the United States of America, and used in the operation of various railroads, to wit: Boston & Maine Railroad, Maine Central Railroad; which said use was a public use connected with the common defense."

That the fair and reasonable value of the coal was \$4.536 per ton f. o. b. the mines; that nothing has been

paid to claimant on account of said coal so commandeered and requisitioned, and it should have judgment for the value thereof with interest.

A motion by the United States to dismiss the action upon the ground that the claimant was a citizen of Connecticut and therefore the court lacked jurisdiction, was overruled. Thereupon, the United States interposed a demurrer and set up that the court had no jurisdiction of the cause; that the statement of claim showed no cause of action; that under the Lever Act district courts of the United States have jurisdiction of actions only after determination by the President of the value of the property taken, expression of dissatisfaction by the owner, and payment of seventy-five per centum of the determined amount; that the complaint sets forth a diversion of coal under § 25 of the Lever Act, not a requisition under § 10, and that the remedy, if any, was to sue the Agent designated by the President under § 206 (a) of the Transportation Act, 1920, c. 91, 41 Stat. 456, 461. This was overruled and the United States answered.

It was stipulated by counsel that, "a jury trial being waived, the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with §§ 649 and 700 of the United States Revised Statutes." The cause was heard by the court upon the pleadings and evidence. What purports to be a transcript of the latter is printed; but it was not made part of the record by bill of exceptions. The trial judge filed an opinion and entered judgment for the claimant. No special findings were asked or made.

The cause is here by direct writ of error. The parties agree that only the question of jurisdiction is open. For the United States it is said, "the court below was without jurisdiction to render the judgment, and that is the sole question presented."

As the record contains no bill of exceptions, upon this direct writ of error we can review only questions of law apparent on the face of the pleadings in so far as they directly relate to the court's jurisdiction. *Insurance Company v. Folsom*, 18 Wall. 237; *Law v. United States*, 266 U. S. 494; Judicial Code, § 238.

Jurisdiction was invoked under the Lever Act. The claim is for something alleged to have been commandeered or requisitioned by the President, as provided by § 10, and this section confers jurisdiction without qualification upon district courts to hear and determine controversies directly resulting from such action. *Houston Coal Co. v. United States*, 262 U. S. 361, 365. Proceedings in the district where the seizure actually occurred are not forbidden, and seem entirely appropriate.

The allegations of the complaint were sufficient to set out a substantial claim under a federal statute. Accordingly, there was jurisdiction in the court to pass upon the questions so presented. *Binderup v. Pathe Exchange*, 263 U. S. 291, 305.

*Affirmed.*